



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

COPY 3



1

2

3

4













HARVARD

997

LAW REVIEW

VOL V

1891-92

CAMBRIDGE, MASS.

PUBLISHED BY THE HARVARD LAW REVIEW PUBLISHING ASSOCIATION

1892

*Copyright, 1892*

**BY THE HARVARD LAW REVIEW PUBLISHING ASSOCIATION**

# INDEX.

	PAGE
<b>ARTICLES.</b>	
AGENCY, II. <i>O. W. Holmes, Jr.</i> . . . . .	I
COMPETITION IN BUSINESS, THE PREVENTION OF UNFAIR. <i>Rowland Cox</i> . . . . .	139
CONSTITUTIONAL CHECKS UPON MUNICIPAL ENTERPRISE. <i>Jabes Fox</i> . . . . .	30
EQUITY JURISDICTION, BRIEF SURVEY OF. <i>C. C. Langdell</i> . . . . .	101
EVIDENCE, AN UNSETTLED POINT OF. <i>Augustus P. Loring</i> . . . . .	232
GRATUITOUS UNDERTAKINGS. <i>Joseph H. Beale, Jr.</i> . . . . .	222
INSOLVENT DEBTOR, VALIDITY OF ATTACHMENTS MADE ABROAD BY CREDITORS OF AN. <i>Samuel Williston</i> . . . . .	211
JUDICIAL LEGISLATION: ITS LEGITIMATE FUNCTION IN THE DEVELOPMENT OF THE COMMON LAW. (Harvard Law School Association Prize Essay, 1891.) <i>Esra R. Thayer</i> . . . . .	172
JURY AND ITS DEVELOPMENT, THE. I, II, III. <i>James B. Thayer</i> . . . . .	249, 295, 357
LAND, RESTRICTIONS UPON THE USE OF. <i>Charles I. Giddings</i> . . . . .	274
MUNICIPAL BONDS, A RECENT DECISION OF THE SUPREME COURT UPON. <i>Frank W. Hackett</i> . . . . .	157
NEMO TENETUR SEIPSUM PRODERE. <i>John H. Wigmore</i> . . . . .	71
OLDER MODES OF TRIAL, THE. <i>James B. Thayer</i> . . . . .	45
SUGAR BOUNTIES, THE. <i>Chas. F. Chamberlayne</i> . . . . .	320
TILDEN TRUST, THE FAILURE OF THE. <i>James Barr Ames</i> . . . . .	389
WITNESSES, THE PRIVILEGE OF, IN FEDERAL COURTS. <i>Louis M. Greeley</i> . . . . .	24
<b>CASES.</b>	
ADMIRALTY. Statutory liability of owner . . . . .	350
Maritime contracts . . . . .	243
ADMINISTRATORS. Personal liability . . . . .	149
AGENCY. Apparent authority . . . . .	244
Contract by unauthorized agent . . . . .	39
Contract contravening "Employer's Liability Act" void . . . . .	94
Contract to employ for a time certain . . . . .	206
Liability of agent unlawfully selling intoxicating liquor . . . . .	94
Liability of employer for injury to servants . . . . .	39
Promise by employer to repair . . . . .	39
Power of legislature to ratify unauthorized act . . . . .	206
Ratification implied . . . . .	243
Ratification not binding, when . . . . .	409
Revocation of authority; commission . . . . .	40

	PAGE
<b>CASES — AGENCY — Continued.</b>	
Variance from authority . . . . .	409
<i>See Master and Servant; Statute of Frauds.</i>	
<b>ASSIGNMENT.</b> Chaplains to work-houses may assign their salaries . . .	190
<b>BAILMENT.</b> <i>Jus tertii</i> — Defence by bailee . . . . .	40
<b>BILLS AND NOTES.</b> Acceptance of forged bill . . . . .	290
Acceptance by telegram . . . . .	350
Anomalous indorser . . . . .	289
Collateral agreement between indorser or indorsee . . . . .	95
Conditional payment of existing debt . . . . .	289
Fictitious payee equivalent to bearer . . . . .	290
Fictitious payee may be an existing person . . . . .	290
Instalment note payable on default, not negotiable . . . . .	206
Moral consideration . . . . .	409
Payment of forged bill . . . . .	94, 350
Seal rendering instrument non-negotiable . . . . .	40
Statute of limitations . . . . .	409
Warranty in fraudulent reissue of genuine bonds . . . . .	290
<i>See Conflict of Laws.</i>	
<b>CHAMPERTY.</b> Effect on right of action . . . . .	409
<b>CHINESE EXCLUSION ACT.</b> <i>See Jurisdiction.</i>	
<b>CIRCUIT COURTS OF APPEAL.</b> <i>See Jurisdiction.</i>	
<b>COMMON CARRIERS.</b> Exemption of grain-elevator from taxes . . . . .	290
Liability for ejection; Sunday law . . . . .	350
Limitation of liability . . . . .	150
Right to eject passenger having no ticket . . . . .	243, 244
Shipment and delivery of live stock . . . . .	95
<i>See Conflict of Laws; Telephone Co.</i>	
<b>CONFLICT OF LAWS.</b> Bills of exchange . . . . .	350
Garnishment . . . . .	40
Interest after maturity . . . . .	350
<i>Lex loci</i> , contract . . . . .	206
<i>Lex loci</i> , sale . . . . .	206
Right of personal representative to sue for tort . . . . .	206
<b>CONSTITUTIONAL LAW.</b> Admission of women to bar . . . . .	244
Advisory opinions . . . . .	207
Australian ballot; how to mark . . . . .	207
Australian ballot; educational test . . . . .	207
"CrUEL and unusual punishment" . . . . .	409
Delegation of power by legislature . . . . .	207
Eminent domain. Conflicting uses . . . . .	244
Grade crossings . . . . .	350
Public use, what is . . . . .	351
Railroad in street; compensation to abutting owners . . . . .	292
Telegraph lines an additional burden . . . . .	152
Exclusion from court of public in criminal case . . . . .	409
Forfeiture of property of association . . . . .	409
Impairment of obligation of contract . . . . .	244, 351, 409
Interstate commerce. Licensing pedlars . . . . .	95
Licensing tug-boats . . . . .	95
Original package; "Wilson Bill" . . . . .	150

# INDEX.

v

	PAGE
<b>CASES — CONSTITUTIONAL LAW — <i>Continued.</i></b>	
Interstate Commerce. Restrictions on immigration . . . . .	207
Taxation . . . . .	244, 350, 410
Jurisdiction of consul . . . . .	207
Police power. Electric wires on roofs may be prohibited . . . . .	290
Weavers' fines act unconstitutional . . . . .	351
Protection of witnesses from self-crimination . . . . .	410
Religious liberty; compulsory attendance at college chapel . . . . .	150
Taxation. Electric companies, not manufacturing . . . . .	293
National banks . . . . .	42
<i>See Corporations; Equity.</i>	
<b>CONSTRUCTION. <i>See Wills; Contracts.</i></b>	
<b>CONTRACT. Defence on ground of illegality . . . . .</b>	<b>244</b>
Dependent covenants; breach; recovery of consideration . . . . .	95
Illegal as affecting interstate commerce . . . . .	410
Insurance; cancellation; when taking effect . . . . .	351
Mutual consent; offer of reward . . . . .	351
Non-performance not excused by strikes . . . . .	150
Performance delayed by strikes . . . . .	351
Public policy . . . . .	150
Want of consideration; fraudulent, when . . . . .	150
<i>See Agency; Common Carriers; Equity; Insurance.</i>	
<b>CONTRIBUTORY NEGLIGENCE. <i>See Negligence.</i></b>	
<b>COPYRIGHT. Dramatizing a novel . . . . .</b>	<b>40</b>
<b>CORPORATIONS. Duty of stockholders before bill against directors . . . . .</b>	<b>291</b>
Limitation of indebtedness . . . . .	410
Municipal assessments on . . . . .	410
Not persons . . . . .	40
Telegraph and telephone . . . . .	95
<i>Ultra vires</i> contract void . . . . .	95
<b>CRIMINAL LAW. Alien labor; liability limited to valid contracts . . . . .</b>	<b>96</b>
Crimes by an escaped convict . . . . .	150
Defence of alibi . . . . .	351
False pretences . . . . .	352
Homicide occasioned by resistance to unlawful arrest . . . . .	96
Offence included in another . . . . .	291
Participation by detective in order to convict . . . . .	291
Previous acquittal secured by bribery . . . . .	291
<i>See Evidence.</i>	
<b>DAMAGES. Mental suffering not included . . . . .</b>	<b>41</b>
Prospective; to abutting owners . . . . .	411
Punitive, not allowed . . . . .	40
Racing fines not included . . . . .	41
<i>See Torts.</i>	
<b>DECEIT. <i>See Torts.</i></b>	
<b>DEDICATION. <i>See Real Property.</i></b>	
<b>DEEDS. <i>See Real Property.</i></b>	
<b>DEMURRAGE. <i>See Contract.</i></b>	
<b>DRUGGIST'S LICENSE. <i>See Liquor License.</i></b>	
<b>EASEMENTS. <i>See Real Property.</i></b>	
<b>EMINENT DOMAIN. <i>See Constitutional Law; Real Property.</i></b>	

	PAGE
<b>CASES—Continued.</b>	
<b>EQUITY.</b> Combination in restraint of trade . . . . .	41
Injunction against wrongful attachment . . . . .	96
against criminal proceedings; interstate commerce . . . . .	96
attempt to anticipate . . . . .	245, 291
by taxpayer, when . . . . .	411
restraining action at law . . . . .	352
Right of mortgagee to possession . . . . .	245
Parol contract to convey land . . . . .	4
Part-performance, what is . . . . .	411
Relief to wrong-doer, when . . . . .	151
Sale of church property for debt . . . . .	96
Specific performance . . . . .	245
<b>ESTOPPEL.</b> Does not render one liable in tort . . . . .	352
<b>EVIDENCE.</b> Account books . . . . .	96
Confessions; exclamations made in sleep . . . . .	245
Damages, collateral matter . . . . .	352
Deed absolute in form . . . . .	245
Judicial notice not taken of patents . . . . .	291
Husband can testify, when . . . . .	41
Pardoned criminal a competent witness . . . . .	411
Telegraph lines an additional burden . . . . .	152
Witness defendant subject to cross-examination . . . . .	150
<i>See Constitutional Law.</i>	
<b>EXTRADITION.</b> Cannot try for different offence . . . . .	411
<b>HUSBAND AND WIFE.</b> Allowance to divorced wife . . . . .	290
Authority of husband . . . . .	151
Divorce; adultery . . . . .	411
<b>INFAMY.</b> Right of next friend to compromise . . . . .	352
<b>INJUNCTION.</b> <i>See Equity.</i>	
<b>INSURANCE.</b> A trade . . . . .	150
Conditions, Construction of . . . . .	411
Waiver of . . . . .	207
Knowledge of ownership imputable to company . . . . .	290
Insurable interest, what is . . . . .	151
Quasi-contract . . . . .	352
Recovery by executor of insured . . . . .	411
Sunstroke a disease not an accident . . . . .	151
<i>See Contracts.</i>	
<b>JURISDICTION.</b> Circuit Courts of Appeal and Chinese exclusion . . . . .	292
<b>INTERNATIONAL LAW.</b> Right of alien to enter a country . . . . .	245
<b>LIBEL.</b> Privilege of reasons for removal of servants . . . . .	292
<b>LIENS.</b> Claims inconsistent with lien . . . . .	208
<i>See Mortgages.</i>	
<b>LIQUOR LICENSE.</b> Necessary for druggist . . . . .	291
<b>MANDAMUS.</b> To compel railroad to stop at town . . . . .	412
<b>MASTER AND SERVANT.</b> Common employment . . . . .	149, 243, 350
Duty of servant to adjust appliances . . . . .	289
Duty to provide suitable appliances . . . . .	289
Liability for the act of a volunteer . . . . .	243
<i>Volenti non fit injuria</i> . . . . .	243, 408



CASES — *Continued.*

PAGE

MORTGAGES. Intention to keep alive . . . . .	412
Part-avoidance of first chattel mortgage benefits second. . . . .	292
Subrogation . . . . .	41
See <i>Equity; Real Property.</i>	
MUNICIPAL CORPORATIONS. Buildings for private purposes . . . . .	96
Majority vote, what constitutes . . . . .	412
NEGLIGENCE. Contractual relation; no liability to stranger . . . . .	41
Negligence, what is . . . . .	208
Duty to stranger; implied invitation . . . . .	245, 246
Imputed; doctrine of <i>Thorogood v. Bryan</i> . . . . .	412
Liability to trespassers . . . . .	208
Right of way; street car . . . . .	353
See <i>Real Property.</i>	
PARLIAMENTARY LAW. Power of presiding officer to arrest member . . . . .	90
PARTNERSHIP. Foreign firm; service of process . . . . .	246
Rights of retiring partners . . . . .	412
Theatre firm presumptively a non-trading partnership . . . . .	292
PATENTS. See <i>Evidence.</i>	
PERPETUITIES. See <i>Real Property.</i>	
PERSONAL PROPERTY. Gifts <i>inter vivos</i> ; <i>Irons v. Smallpiece</i> . . . . .	151
Rights in one's designs . . . . .	412
War premiums . . . . .	151
POLICE POWER. See <i>Constitutional Law.</i>	
PRACTICE. Judge having opinion on case may sit . . . . .	412
Suspension of sentence by the court. . . . .	292
PRIOR EQUITIES. See <i>Trusts.</i>	
PROPERTY. Right of possession of dead body . . . . .	292
Separate estate for unmarried women . . . . .	353
Trade-marks . . . . .	412
PUBLIC POLICY. See <i>Assignment; Contracts; Restraint of Trade.</i>	
PURCHASER FOR VALUE. See <i>Trusts.</i>	
QUASI-CONTRACTS. Officious benefit prevents recovery. . . . .	151
Right of son against parent . . . . .	353
Voluntary service . . . . .	208
See <i>Insurance.</i>	
REAL PROPERTY. Acceptance of grants, when presumed . . . . .	42
Adverse possession; tacking interests; statute of limitations . . . . .	97
what constitutes . . . . .	208
Australian Land Transfer System . . . . .	208
Boundaries; lakes . . . . .	152
Contract for purchase when terminated . . . . .	41
Conveyance by wife; intimidation by husband . . . . .	246
Covenants in deeds for restrictions in building . . . . .	152
Covenants running with the land . . . . .	353
Dedication, what constitutes acceptance of . . . . .	246, 413
Deeds; delivery to be presumed if recorded. . . . .	246
Devise to A "for life and life of heir" . . . . .	292
Dower, when barred . . . . .	246
Easement; alteration of . . . . .	353
freedom from noise . . . . .	414

	PAGE
<b>CASES — REAL PROPERTY — <i>Continued.</i></b>	
Easement; tacking different users . . . . .	413
Eminent domain; condemnation of leasehold . . . . .	42
Escrow; happening of condition . . . . .	152
Executory devise . . . . .	354
Fee in way . . . . .	353
Mortgage; failure to account for rents . . . . .	245
Percolating water; negligence . . . . .	42
Prescription; tacking . . . . .	246
Remoteness; possibility of reverter . . . . .	413
Right of reversioner to sue . . . . .	353
Riparian rights; beds of rivers . . . . .	151
mill site . . . . .	353
Shelley's case . . . . .	96
Splitting contingency to avoid remoteness, when . . . . .	413
Tenancy by entirety; effect of divorce on . . . . .	293
Waste, what constitutes . . . . .	414
Widow's right of dower free from equities . . . . .	413
<i>See Wills.</i>	
REPLEVIN. <i>See Damages.</i>	
RESTRAINT OF TRADE. Order by town . . . . .	41, 208
STATUTES. Intoxicating liquors; minors . . . . .	152
Territorial courts . . . . .	152
Widow's allowance . . . . .	414
STATUTE OF FRAUDS. Part-performance . . . . .	149
<i>See Trusts.</i>	
STATUTE OF LIMITATIONS. Property in chattels; conversion; demand and refusal . . . . .	97
<i>See Bills and Notes; Trusts.</i>	
SURETYSHIP. Concealment by principal when not to surety's prej- dice . . . . .	414
Guarantee of mortgage note . . . . .	414
TAXATION. <i>See Constitutional Law.</i>	
TELEGRAPH. Failure to deliver telegram . . . . .	244
TELEPHONE COMPANIES. Are common carriers . . . . .	290
TORTS. Arrest by officer without warrant . . . . .	42
Civil suit for violation of exemption statute . . . . .	293
Deceit, what constitutes . . . . .	209
Forcible entry, what amounts to . . . . .	209
Malicious bringing of civil suit . . . . .	209
Malicious interference with trade . . . . .	208
Pledge; property in the goods . . . . .	353
Procuring breach of contract . . . . .	42
Seduction; loss of service . . . . .	353
Trover; pledge; property in good . . . . .	354
Wife may sue for enticing away husband . . . . .	414
<i>See Conflict of Laws; Libel; Negligence.</i>	
TRUSTS. Contract to sell land; right of vendee . . . . .	43
Conveyance taken by agent; statute of frauds . . . . .	43
Fraudulent conveyance by trustee . . . . .	415
Insurance; murder of insured by beneficiary . . . . .	247

# INDEX.

ix

PAGE

## CASES — Trusts — *Continued.*

Lack of beneficiaries . . . . .	415
Parol agreement ; statute of frauds . . . . .	247
Prior equity . . . . .	209
Representation of trustee concerning prior equities . . . . .	293
Prior equity in pledged chattel . . . . .	293
Statute of limitations . . . . .	247
Voluntary settlement . . . . .	43
What property to receiver of corporation . . . . .	415
USURY. Effect of usury as penalty only on contract . . . . .	209
Payment ; action to recover . . . . .	247
WILLS. Acceleration of legacies . . . . .	152, 415
Ademption ; presumption against double portions . . . . .	97
Burden of proof of undue influence . . . . .	209
Charitable bequest ; <i>cy-près</i> . . . . .	247
Debenture stock excluded from bequest of "shares" . . . . .	293
Debts of legatees barred by limitations subtracted . . . . .	293
Right of creditor of heir to contest will of testator . . . . .	97
Signature must be subscribed . . . . .	152
Testamentary covenants ; validity . . . . .	354

*See Real Property.*

WITNESSES. *See Constitutional Law.*

LEADING ARTICLES IN EXCHANGES. . 44, 100, 156, 210, 248, 294, 356, 418

## LECTURE NOTES.

CONTRACTS, Repudiation of . . . . .	241
CONTRIBUTORY NEGLIGENCE. Causation. . . . .	92
PARTNERSHIP. Proof in bankruptcy on joint obligations . . . . .	406
PROPERTY. Remoteness of separable gifts. . . . .	348
REPUDIATION OF CONTRACTS . . . . .	241
STATUTE OF LIMITATIONS IN CASE OF FRAUD OR MISTAKE. At law . . . . .	
and in equity . . . . .	38

## NOTES.

ALABAMA CLAIMS . . . . .	204
"ANARCHIST," Libellous to call a man an . . . . .	288
ANIMALS <i>Fera Nature</i> . No rights gained by trespasser . . . . .	404
BOSTON UNIVERSITY LAW SCHOOL, Case system in . . . . .	345
COLLEGE DEGREE, Right to compel a college to confer . . . . .	205
COLUMBIA AND NEW YORK LAW SCHOOLS . . . . .	146
COMMON SCOLD. Still indictable as a nuisance in New Jersey . . . . .	91
CONSTITUTIONAL LAW. Weavers' fines act declared unconstitutional . . . . .	287
CONTRACTS, Legal detriment in . . . . .	147
CRIMINAL APPEALS, The New York statutory provisions for . . . . .	289
CRIMINAL CASES, Jury's duty in . . . . .	285
DAMAGES FOR MENTAL SUFFERING . . . . .	285
DEAD BODY, Nature of the rights in a . . . . .	285
ELEVATED RAILWAYS. Liability to abutters . . . . .	203
EMPLOYER'S LIABILITY for injuries from defective machinery . . . . .	37
ENGLISH JUDGES OF TO-DAY . . . . .	405

	PAGE
NOTES— <i>Continued.</i>	
HARVARD LAW SCHOOL. Increased number of students . . . . .	238
New case books . . . . .	345
The Dean's annual report . . . . .	403
HOMICIDE, Justifiable . . . . .	240
JUDGE, Misconduct of a . . . . .	346
JUDICIAL GRAMMAR . . . . .	239
JURY'S DUTY IN CRIMINAL CASES . . . . .	285
JURY, TRIAL BY. American Bar Association . . . . .	202
JUSTIFIABLE HOMICIDE . . . . .	240
KILLING A THIEF . . . . .	240
LANGDELL CASE SYSTEM. Its increasing influence in England and America . . . . .	89
LEGAL DETRIMENT IN CONTRACTS . . . . .	147
LIBEL. Libellous to call a man an "Anarchist" . . . . .	288
MENTAL SUFFERING, Damages for . . . . .	285
MISCONDUCT OF A JUDGE . . . . .	346
POLITICAL ASSESSMENTS . . . . .	286
PRIVACY, Right to . . . . .	148
PRIVILEGE OF WITNESSES IN FEDERAL COURTS . . . . .	346
RIGHTS IN A DEAD BODY, Nature of . . . . .	285
RIGHT OF A FORMER WARD OF COURT TO MARRY . . . . .	405
SALE OF CHURCH PROPERTY FOR DEBT . . . . .	91
TILDEN WILL CASE . . . . .	240
TRESPASS. Inevitable accident a defence to action for shooting . . . .	36
TRIAL BY JURY. American Bar Association . . . . .	202
TROVER. Conversion before plaintiff's title has accrued . . . . .	347
TRUSTS. Gift of a chose in action . . . . .	35
WATUPPA POND CASES, Reversal of decision in . . . . .	148
WEAVERS' FINES ACT DECLARED UNCONSTITUTIONAL . . . . .	287
WITNESSES IN FEDERAL COURTS, Privilege of . . . . .	346
REVIEWS.	
American Bar Association, Report of . . . . .	417
American Digest, 1891 . . . . .	355
Bigelow on Torts. 4 ed. . . . .	210
Black on Judgments . . . . .	43
Black's Law Dictionary . . . . .	155
Boutmy on Constitutional Law . . . . .	155
Digest XIX. 2. <i>Locati Conducti</i> . . . . .	415
Dunlap's Abridgment of Elementary Law . . . . .	417
Elliott on the Law of Roads and Streets . . . . .	99
General Digest, 1891 . . . . .	356
Houston on Canadian Constitution . . . . .	98
Keener's Selection on Contracts . . . . .	355
Lawyers' Reports Annotated . . . . .	355
Prescription in England . . . . .	153
Ray on Negligence of Imposed Duties . . . . .	248
Revised Statutes of the United States . . . . .	294
Rogers on Expert Testimony . . . . .	99
Sedgwick on Damages. 8 ed. . . . .	153

**INDEX.**

**xi**

**PAGE**

**REVIEWS — Continued.**

Thompson on Electricity . . . . .	154
Tiedeman on Personal Property . . . . .	97
Vinogradoff on <i>Villainage</i> in England . . . . .	416
Wentworth on Interstate Commerce Law . . . . .	155
Williams on Wills and Intestate Succession . . . . .	98



# HARVARD LAW REVIEW.

---

VOL. V.

APRIL 15, 1891.

NO. 1.

---

## AGENCY.<sup>1</sup>

### II.

---

THE history of agency as applied to contract is next to be dealt with. In this branch of the law there is less of anomaly and a smaller field in which to look for traces of fiction than the last. A man is not bound by his servant's contracts unless they are made on his behalf and by his authority, and that he should be bound then is plain common-sense. It is true that in determining how far authority extends, the question is of ostensible authority and not of secret order. But this merely illustrates the general rule which governs a man's responsibility for his acts throughout the law. If, under the circumstances known to him, the obvious consequence of the principal's own conduct in employing the agent is that the public understand him to have given the agent certain powers, he gives the agent those powers. And he gives them just as truly when he forbids their exercise as when he commands it. It seems always to have been recognized that an agent's ostensible powers were his real powers;<sup>2</sup> and on the other hand it always has been the law that an agent could not bind his principal beyond the powers actually given in the sense above explained.

There is, however, one anomaly introduced by agency even into the sphere of contract,—the rule that an undisclosed principal may sue or be sued on a contract made by an agent on his behalf;

---

<sup>1</sup> 4 Harv. Law Rev. 345.

<sup>2</sup> Y. B. 27 Ass., pl. 5, fol. 133; Anon., 1 Shower, 95; Nickson v. Brohan, 10 Mod. 109, etc.

and this must be examined, although the evidence is painfully meagre. The rule would seem to follow very easily from the identification of agent and principal, as I shall show more fully in a moment. It is therefore well to observe at the outset that the power of contracting through others, natural as it seems, started from the family relations, and that it has been expressed in the familiar language of identification.

Generally speaking, by the Roman law contractual rights could not be acquired through free persons who were strangers to the family. But a slave derived a standing to accept a promise to his master *ex persona domini*.<sup>1</sup> Bracton says that contracts can be accepted for a principal by his agent; but he starts from the domestic relations in language very like that of the Roman juriconsults. An obligation may be acquired through slaves or free agents in our power, if they take the contract in the name of their master.<sup>2</sup>

It was said under Henry V. that a lease made by the seneschal of a prior should be averred as the lease of the prior,<sup>3</sup> and under James I. it was held that an assumpsit to a servant for his master was properly laid as an assumpsit to the master.<sup>4</sup> West's Symboleography belongs to the beginning of the same reign. It will be remembered that the language which has been quoted from that work applies to contracts as well as to torts. A discussion in the Year Book, 8 Edward IV., fol. 11, is thus abridged in Popham: "My servant makes a contract, or buys goods to my use; I am liable, and it is my act."<sup>5</sup> Baron Parke explains the requirement that a deed executed by an agent should be executed in the name of his principal, in language repeated from Lord Coke: "The attorney is . . . put in place of the principal and represents his person."<sup>6</sup> Finally, Chitty, still speaking of contracts, says, like

<sup>1</sup> Inst. 3, 17, pr. See Gaius, 3, §§ 164-166.

<sup>2</sup> "Videndum etiam est per quas personas acquiratur obligatio, et sciendum quod per procuratores, et per liberos, quos sub potestate nostra habemus, et per nosmetipsos, et filios nostros et per liberos homines servientes nostros." Bract., fol. 100 b. So, "Etiam dormienti per servum acquiratur, ut per procuratorem, si nomine domini stipuletur." Bract., fol. 28 b.

<sup>3</sup> Y. B. 8 H. V. 4, pl. 17.

<sup>4</sup> Seignior & Wolmer's Case, Godbolt, 360 (T. 21 Jac.). Cf. Jordan's Case, Y. B. 27 H. VIII. 24, pl. 3.

<sup>5</sup> Drope v. Theyar, Popham, 178, 179 (P. 2 Car. I.).

<sup>6</sup> Hunter v. Parker, 7 M. & W. 322, 343 (1840); Combes's Case, 9 Rep. 75 a, 76 b, 77 (T. 11 Jac.). The fiction of identity between principal and agent was fully stated by



West, that "In point of law the master and servant, or principal and agent, are considered as one and the same person."<sup>1</sup>

I have found no early cases turning upon the law of undisclosed principal. It will be remembered that the only action on simple contract before Henry VI., and the chief one for a good while after, was debt, and that this was founded on a *quid pro quo* received by the debtor. Naturally, therefore, the chief question of which we hear in the earlier books is whether the goods came to the use of the alleged debtor.<sup>2</sup> It is at a much later date, though still in the action of debt, that we find the most extraordinary half of the rule under consideration first expressly recognized. In *Scrimshire v. Alderton*<sup>3</sup> (H. 16 G. II.) a suit was brought by an undisclosed principal against a purchaser from a *del credere* factor. Chief Justice Lee "was of opinion that this new method [*i.e.*, of the factor taking the risk of the debt for a larger commission] had not deprived the farmer of his remedy against the buyer." And he was only prevented from carrying out his opinion by the obstinacy of the jury at Guildhall. The language quoted implies that the rule was then well known, and this, coupled with the indications to be found elsewhere, will perhaps warrant the belief that it was known to Lord Holt.

*Scott v. Surman*,<sup>4</sup> decided at the same term that *Scrimshire v. Alderton* was tried, refers to a case of T. 9 Anne, *Gurratt v. Cullum*,<sup>5</sup> in which goods were sold by factors to J. S. without disclosing their principal. The factors afterwards went into bankruptcy. Their assignee collected the debt, and the principal then sued him for the money. "And this matter being referred by Holt for the opinion of the King's Bench, judgment was given on argument for the plaintiff. Afterwards at Guildhall, before Lord Chief Justice Parker, this case was cited and allowed to be law, because though it was agreed that payment by J. S. to [the factors] with whom the contract was

---

Hobbes, who said many keen things about the law. *Leviathan*, Part I. ch. 16. "Of Persons, Authors, and Things Personated." Also *De Homine*, I. c. 15. *De Homine Fictitio*.

<sup>1</sup> 1 Bl. Comm. 429, note.

<sup>2</sup> Fitz. Abr. *Debt*, pl. 3 (T. 2 R. II.). Cf. *Alford v. Eglsfield*, Dyer, 230 b (T. 6 Eliz.), and notes.

<sup>3</sup> 2 Strange, 1182.

<sup>4</sup> Willes, 400, at p. 405 (H. 16 G. II.).

<sup>5</sup> Also reported in Buller, N. P. 42. Cf. *Whitecomb v. Jacob*, 1 Salk. 160 (T. 9 Anne).

made would be a discharge to J. S. against the principal, yet the debt was not in law due to them, but to the person whose goods they were . . . and being paid to the defendant who had no right to have it, it must be considered in law as paid for the use of him to whom it was due." This explanation seems to show that Chief Justice Parker understood the law in the same way as Chief Justice Lee, and, if it be the true one, would show that Lord Holt did also. I think the inference is somewhat strengthened by other cases from the Salkeld MSS. cited in Buller's *Nisi Prius*.<sup>1</sup> Indeed I very readily should believe that at a much earlier date, if one man's goods had come to another man's hands by purchase, the purchaser might have been charged, although he was unknown and had dealt through a servant,<sup>2</sup> and that perhaps he might have been, in the converse case of the goods belonging to an undisclosed master.<sup>3</sup>

The foregoing cases tend to show, what is quite probable, that the doctrine under discussion began with debt. I do not wish to undervalue the argument that may be drawn from this fact, that the law of undisclosed principal has no profounder origin than the thought that the defendant, having acquired the plaintiff's goods by way of purchase, fairly might be held to pay for them in an action of contract, and that the rule then laid down has been extended since to other contracts.<sup>4</sup>

But suppose what I have suggested be true, it does not dispose of the difficulties. If a man buys B.'s goods of A., thinking A. to be the owner, and B. then sues him for the price, the defendant fairly may object that the only contract which he has either consented or purported to make is a contract with A., and that a stranger, to both the intent and the form of a voluntary obligation cannot sue upon it. If the contract was made with the owner's consent, let the contractee bring his action. If it was made without actual or ostensible authority, the owner's rights can be asserted in an action of tort. The general rule in case of a tortious sale is

<sup>1</sup> *Gonzales v. Sladen*; *Thorpe v. How* (H. 13 W. III.); Buller, N. P. 130.

<sup>2</sup> See *Goodbaylie's Case*, Dyer, 230 b, pl. 56, n.; *Truswell v. Middleton*, 2 Roll. R. 269, 270. Note, however, the insistence on the servant being known as such in *Fitz. Abr. Debt*, pl. 3; 27 Ass., pl. 5, fol. 133.

<sup>3</sup> Consider the doubt as to ratifying a distress made "generally not showing his intent nor the cause wherefore he distrained" in *Godbolt*, 109, pl. 129 (M. 28 & 29 Eliz.). Suppose the case had been contract instead of tort, and with actual authority, would the same doubt have been felt?

<sup>4</sup> *Sims v. Bond*, 5 B. & Ad. 389, 393 (1833). Cf. *Bateman v. Phillips*, 15 East, 272 (1812).

that the owner cannot waive the tort and sue in *assumpsit*.<sup>1</sup> Why should the fact that the seller was secretly acting in the owner's behalf enlarge the owner's rights as against a third person? The extraordinary character of the doctrine is still clearer when it is held that under a contract purporting to be made with the plaintiff and another jointly, the plaintiff may show that the two ostensible joint parties were agents for himself alone, and thus set up a several right in the teeth of the words used and of the ostensible transaction, which gave him only a joint one.<sup>2</sup>

Now, if we apply the formula of identification and say that the agent represents the person of the owner, or that the principal adopts the agent's name for the purposes of that contract, we have at once a formal justification of the result. I have shown that the power of contracting through agents started from the family, and that principal and agent were identified in contract as well as in tort. I think, therefore, that the suggested explanation has every probability in its favor. So far as Lord Holt is concerned, I may add that in *Gurratt v. Cullum* the agent was a factor, that a factor in those days always was spoken of as a servant, and that Lord Holt was familiar with the identification of servant and master. If he was the father of the present doctrine, it is fair to infer that the technical difficulty was consciously or unconsciously removed from his mind by the technical fiction. And the older we imagine the doctrine to be, the stronger does a similar inference become. For just in proportion as we approach the archaic stage of the law, the greater do we find the technical obstacles in the way of any one attempting to enforce a contract except the actual party to it, and the greater therefore must have been the need of a fiction to overcome them.<sup>3</sup>

The question which I have been considering arises in another form with regard to the admission of oral evidence in favor of or to charge a principal, when a contract has been made in writing, which purports on its face to be made with or by the alleged agent

---

<sup>1</sup> *Berkshire Glass Co. v. Wolcott*, 2 Allen (Mass.), 227.

<sup>2</sup> *Spurr v. Cass*, L. R. 5 Q. B. 656. See further, *Sloan v. Merrill*, 135 Mass. 17, 19.

<sup>3</sup> Cf. The Common Law, ch. x. and xi. "Unsere heutigen Anschauungen . . . können sich nur schwer in ursprüngliche Rechtszustände hineinfinden, in welchen . . . bei Contrahirung oder Zahlung einer Schuld die handelnden Subjecte nicht als *personae fungibiles* galten." Brunner, Zulässigkeit der Anwaltschaft im französischen etc. Rechte. (Zeitschr. für vergleich. Rechtswissenschaft.) *Norcross v. James*, 140 Mass. 188, 189.

in person. Certainly the argument is strong that such evidence varies the writing, and if the Statute of Frauds applies, that the statute is not satisfied unless the name of the principal appears. Yet the contrary has been decided. The step was taken almost *sub silentio*.<sup>1</sup> But when at last a reason was offered, it turned on, or at least was suggested by, the notion of the identity of the parties. It was in substance that the principal "is taken to have adopted the name of the [agent] as his own, for the purpose of such contracts," as it was stated by Smith in his Leading Cases, paraphrasing the language of Lord Denman in *Trueman v. Loder*.<sup>2</sup>

I gave some evidence, at the beginning of this discussion, that notions drawn from the *familia* were applied to free servants, and that they were extended beyond the domestic relations. All that I have quoted since tends in the same direction. For when such notions are applied to freemen in a merely contractual state of service it is not to be expected that their influence should be confined to limits which became meaningless when servants ceased to be slaves. The passage quoted from Bracton proved that already in his day the analogies of domestic service were applied to relations of more limited subjection. I have now only to complete the proof that agency in the narrower sense, the law familiar to the higher and more important representatives employed in modern business, is simply a branch of the law of master and servant.

First of the attorney. The primitive lawsuit was conducted by the parties in person. Counsel, if they may be called so, were very early admitted to conduct the formal pleadings in the presence of the party, who was thus enabled to avoid the loss of his suit, which would have followed a slip on his own part in uttering the formal words, by disavowing the pleading of his advocate. But the Frankish law very slowly admitted the possibility of giving over the conduct of a suit to another, or of its proceeding in the absence of the principals concerned. Brunner has traced the history of the innovation by which the appointment of an attorney (i. e., *loco positus*) came generally to be permitted, with his usual ability. It was brought to England with the rest of the

<sup>1</sup> *Bateman v. Phillips*, 15 East, 272 (1812); *Garrett v. Handley*, 4 B. & C. 674 (1825); *Higgins v. Senior*, 8 M. & W. 834, 844 (1841).

<sup>2</sup> 11 Ad. & El. 595; 3 P. & D. 267, 271 (1840); 2 Sm. L. C., 8th ed., 408, note 10 *Thompson v. Davenport*; *Byington v. Simpson*, 134 Mass. 169, 170.

Norman law, was known already to Glanvill, and gradually grew to its present proportions. The question which I have to consider, however, is not the story of its introduction, but the substantive conception under which it fell when it was introduced.

If you were thinking of the matter *a priori* it would seem that no reference to history was necessary, at least to explain the client's being bound in the cause by his attorney's acts. The case presents itself like that of an agent authorized to make a contract in such terms as he may think advisable. But as I have hinted, whatever common-sense would now say, even in the latter case it is probable that the power of contracting through others was arrived at in actual fact by extending the analogy of slaves to freemen. And it is at least equally clear that the law had need of some analogy or fiction in order to admit a representation in lawsuits. I have given an illustration from Iceland in my book on the Common Law. There the contract of a suit was transferred from Thorgeir to Mord "as if he were the next of kin."<sup>1</sup> In the Roman law it is well known that the same difficulty was experienced. The English law agreed with the Northern sources in treating attorneys as sustaining the *persona* of their principal. The result may have been worked out in a different way, but that fundamental thought they had in common. I do not inquire into the recondite causes, but simply observe the fact.

Bracton says that the attorney represents the *persona* of his principal in nearly everything.<sup>2</sup> He was "put in the place of" his principal, *loco positus* (according to the literal meaning of the word *attorney*), as every other case in the *Abbreviatio Placitorum* shows. The *essoign de malo lecti* had reference to the illness of the attorney as a matter of necessity.<sup>3</sup> But, in general, the attorney was dealt with on the footing of a servant, and he is called so as soon as his position is formulated. Such is the language of the passage in West's *Symboleography* which I have quoted above, and the anonymous case which held an attorney not liable for maliciously acting in a cause which he knew to be unfounded.<sup>4</sup> When, therefore, it is said that the "act of the attorney

<sup>1</sup> The Common Law, 359. See Brunner, in 1 Holtzendorff, Encyc. II. 3, A. 1, § 2, 3d ed., p. 166. 1 Stubbs, Const. Hist. 82.

<sup>2</sup> "Attornatus fere in omnibus personam domini representat." Bract., fol. 342 a. See LL. Hen. I. 42, § 2.

<sup>3</sup> Bract., fol. 342 a. Cf. Glanv. XI., c. 3.

<sup>4</sup> Anon., 1 Mod. 209, 210 (H. 27 & 28 Car. II.).

is the act of his client," it is simply the familiar fiction concerning servants applied in a new field. On this ground it was held that the client was answerable in trespass, for assault and false imprisonment, where his attorney had caused the party to be arrested on a void writ, wholly irrespective, it would seem, of any actual command or knowledge on the part of the client;<sup>1</sup> and in trespass *quare clausum*, for an officer's breaking and entering a man's house and taking his goods by command of an attorney's agent without the actual knowledge either of the client or the attorney. The court said that the client was "answerable for the act of his attorney, and that [the attorney] and his agent [were] to be considered as one person."<sup>2</sup>

The only other agent of the higher class that I think it necessary to mention is the factor. I have shown elsewhere that he is always called a servant in the old books.<sup>3</sup> West's language includes factors as well as attorneys. Servant, factor, and attorney are mentioned in one breath and on a common footing in the Year Book, 8 Edward IV., folio 11 b. So Dyer,<sup>4</sup> "if a purveyor, factor, or servant make a contract for his sovereign or master." So in trover for money against the plaintiff's "servant and factor."<sup>5</sup> It is curious that in one of the first attempts to make a man liable for the fraud of another, the fraudulent party was a factor. The case was argued in terms of master and servant.<sup>6</sup> The first authority for holding a master answerable for his servant's fraud is another case of a factor.<sup>7</sup> Nothing is said of master and servant in the short note in Salkeld. But in view of the argument in *Southern v. How*, just referred to, which must have been before Lord Holt's mind, and the invariable language of the earlier books, including Lord Holt's own when arguing *Morse v. Slue* ("Factor, who is servant at the master's dispose"),<sup>8</sup> it is safe to assume that he considered the case to be one of master and servant, and it always is cited as such.<sup>9</sup>

<sup>1</sup> *Parsons v. Loyd*, 3 Wils. 341, 345; s. c. 2 W. Bl. 845 (M. 13 G. III. 1772); *Barker v. Braham*, 2 W. Bl. 866, 868, 869; s. c. 3 Wils. 368.

<sup>2</sup> *Bates v. Pilling*, 6 B. & C. 38 (1826).

<sup>3</sup> *The Common Law*, 228, n. 3, 181. See further generally, 230, and n. 4, 5.

<sup>4</sup> *Alford v. Eglisfield*, Dyer, 230 b, pl. 56.

<sup>5</sup> *Holiday v. Hicks*, Cro. Eliz. 638, 661, 746. See further, *Malyne's Lex Merc.*, Pt. I. c. 16; *Molloy*, Book 3, c. 8, § 1; *Williams v. Millington*, 1 H. Bl. 81, 82.

<sup>6</sup> *Southern v. How*, Cro. Jac. 468; s. c. Popham, 143.

<sup>7</sup> *Hern v. Nichols*, 1 Salk. 289.

<sup>8</sup> *Mors v. Slew*, 3 Keble, 72.

<sup>9</sup> *Smith, Master and Servant*, 3d ed., 266.

To conclude this part of the discussion, I repeat from my book on the Common Law,<sup>1</sup> that as late as Blackstone agents appear under the general head of servants; that the precedents for the law of agency are cases of master and servant, when the converse is not the case; and that Blackstone's language on this point is express: "There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards, factors, and bailiffs*; whom, however, the law considers as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property."<sup>2</sup>

Possession is the third branch of the law in which the peculiar doctrines of agency are to be discovered, and to that I now pass.

The Roman law held that the possession of a slave was the possession of his master, on the practical ground of the master's power.<sup>3</sup> At first it confined possession through others pretty closely to things in custody of persons under the *patria potestas* of the possessor (including prisoners *bona fide* held as slaves). Later the right was extended by a constitution of Severus.<sup>4</sup> The common law in like manner allowed lords to appropriate lands and chattels purchased by their villeins, and after they had manifested their will to do so, the occupation of the villeins was taken to be the right of their lords.<sup>5</sup> As at Rome, the analogies of the *familia* were extended to free agents. Bracton allows possession through free agents, but the possession must be held in the name of the principal;<sup>6</sup> and from that day to this it always has been the law that the custody of the servant is the possession of the master.<sup>7</sup>

The disappearance of the servant under the *persona* of his master, of which a trace was discovered in the law of torts, in this instance has remained complete. Servants have no possession of property in their custody as such.<sup>8</sup> The distinction in this regard between servants and all bailees whatsoever<sup>9</sup> is fundamental,

---

<sup>1</sup> P. 228 *et seq.*

<sup>2</sup> 1 Bl. Comm. 427.

<sup>3</sup> The Common Law, 228; Gaius, 3, §§ 164-166.

<sup>4</sup> Inst. 2. 9, §§ 4, 5; C. 7. 32. 1.

<sup>5</sup> Littleton, § 177. Cf. Bract., fol. 191 a; Y. B. 22 Ass., pl. 37, fol. 93; Litt., § 172; Co. Lit. 117 a.

<sup>6</sup> Bract., fol. 28 b, 42 b, 43, etc.; Fleta, IV., c. 3, § 1, c. 10, § 7, c. 11, § 1.

<sup>7</sup> Wheteley v. Stone, 2 Roll. Abr. 556, pl. 14; s. c. Hobart, 180; Drope v. Theyar, Popham, 178, 179.

<sup>8</sup> The Common Law, 227.

<sup>9</sup> The Common Law, 174, 211, 221, 243; Hallgarten v. Oldham, 135 Mass. 1, 9.

although it often has been lost sight of. Hence a servant can commit larceny<sup>1</sup> and cannot maintain trover.<sup>2</sup> A bailee cannot commit larceny<sup>3</sup> and can maintain trover.<sup>4</sup> In an indictment for larceny against a third person the property cannot be laid in a servant,<sup>5</sup> it may be laid in a bailee.<sup>6</sup> A servant cannot assert a lien;<sup>7</sup> a bailee, of course, may, even to the exclusion of the owner's right to the possessory actions.<sup>8</sup>

Here, then, is another case in which effects have survived their causes. But for survival and the fiction of identity it would be hard to explain why in this case alone the actual custody of one man should be deemed by the law to be the possession of another and not of himself.

A word should be added to avoid a misapprehension of which there are signs in the books, and to which I have adverted elsewhere.<sup>9</sup> A man may be a servant for some other purpose, and yet not a servant in his possession. Thus, an auctioneer or a factor is a servant for purposes of sale, but not for purposes of custody. His possession is not that of his principal, but, on the contrary, is adverse to it, and held in his own name, as is shown by his lien. On the other hand, if the fiction of identity is adhered to, there is nothing to hinder a man from constituting another his agent for the sole purpose of maintaining his possession, with the same effect as if the agent were a domestic servant, and in that case the principal would have possession and the agent would not.

Agency is comparatively unimportant in its bearing on possession, for reasons connected with procedure. With regard to chattels, because a present right of possession is held enough to maintain the possessory actions, and therefore a bailor, upon a bailment terminable at his will, has the same remedies as a master, although he is not one. With regard to real estate, because the

<sup>1</sup> Y. B. 13 Ed. IV. 9, 10, pl. 5; 21 H. VII. 14, pl. 21.

<sup>2</sup> The Common Law, 227, n. 2. The distinction mentioned above, under torts, between servants in the house and on a journey, led to the servant's being allowed an appeal of robbery, without prejudice to the general principle. *Heydon & Smith's Case*, 13 Co. Rep. 67, 69; *Drope v. Theyar*, Popham, 178, 179; *Combs v. Hundred of Bradley*, 2 Salk. 613, pl. 2; *ib.*, pl. 1.

<sup>3</sup> 2 Bish. Crim. Law, § 833, 7th ed.

<sup>4</sup> The Common Law, 174, 243.

<sup>5</sup> 2 East, P. C. 652, 653.

<sup>6</sup> Kelyng, 39.

<sup>7</sup> *Bristow v. Whitmore*, 4 De G. & J. 325, 334.

<sup>8</sup> *Lord v. Price*, L. R. 9 Ex. 54; *Owen v. Knight*, 4 Bing. N. C. 54, 57.

<sup>9</sup> The Common Law, 233.



royal remedies, the assizes, were confined to those who had a feudal seisin, and the party who had the seisin could recover as well when his lands were subject to a term of years as when they were in charge of agents or servants.<sup>1</sup>

Ratification is the only doctrine of which the history remains to be examined. With regard to this I desire to express myself with great caution, as I shall not attempt to analyze exhaustively the Roman sources from which it was derived. I doubt, however, whether the Romans would have gone the length of the modern English law, which seems to have grown to its present extent on English soil.

Ulpian said that a previous command to dispossess another would make the act mine, and, although opinion was divided on the subject, he thought that ratification would have the same effect. He agreed with the latitudinarian doctrine of the Sabinians, who compared ratification to a previous command.<sup>2</sup> The Sabinians' "comparison" of ratification to mandate may have been a mere figure of speech to explain the natural conclusion that if one accepts possession of a thing which has been acquired for him by wrongful force, he is answerable for the property in the same way as if he had taken it himself. It therefore is hardly worth while to inquire whether the glossators were right in their comment upon this passage, that the taking must have been in the name of the assumed principal, — a condition which is ambiguously mentioned elsewhere in the Digest.<sup>3</sup>

Bracton copied Ulpian,<sup>4</sup> still, so far as I have observed, not going beyond cases of distress<sup>5</sup> and disseisin.<sup>6</sup> The first reported cases known to me are again assizes of novel disseisin.<sup>7</sup>

But later decisions went much beyond this point, as may be illustrated by one of them.<sup>8</sup> In trespass *de bonis asportatis* the defendant justified as bailiff. After charging the inquest Gascoigne

<sup>1</sup> Bract., fol. 207 a. Cf. ib., 220. Heusler, *Gewere*, 126.

<sup>2</sup> D. 43, 16, 1, §§ 12, 14. Cf. D. 46, 3, 12, § 4.

<sup>3</sup> D. 43, 26, 13 (Pomponius).

<sup>4</sup> Bract., fol. 171 b.

<sup>5</sup> Fol. 158 b, 159 a.

<sup>6</sup> Fol. 171. But note that by ratification "*suam facit injuriam, et ita tenetur ad utrumque, ad restitutionem, s. [et] ad penam.*" *Ibid.* b.

<sup>7</sup> Y. B. 30 Ed. I. 128 (Horwood) (where, however, the modern doctrine is stated and the Roman maxim is quoted by the judge); 38 Ass., pl. 9, fol. 223; s. c. 38 Ed. III. 18; 12 Ed. IV. 9, pl. 23; Plowden, 8 *ad fin.*, 27, 31.

<sup>8</sup> Y. B. 7 H. IV. 34, 35, pl. 1.

said that "if the defendant took the chattels claiming property in himself for a heriot, although the lord afterward agreed to that taking for services due him, still he [the defendant] cannot be called his bailiff for that time. But had he taken them without command, for services due the lord, and had the lord afterwards agreed to his taking, he shall be adjudged as bailiff, although he was nowhere his bailiff before that taking." A ratification, according to this, may render lawful *ab initio* an act which without the necessary authority is a good cause of action, and for which the authority was wanting at the time that it was done. Such is still the law of England.<sup>1</sup> The same principle is applied in a less startling manner to contract, with the effect of giving rights under them to persons who had none at the moment when the contract purported to be complete.<sup>2</sup> In the case of a tort it follows, of course, from what has been said, that if it is not justified by the ratification, the principal in whose name and for whose benefit it was done is answerable for it.<sup>3</sup>

Now it may be argued very plausibly that the modern decisions have only enlarged the comparison of the Sabinians into a rule of law, and carried it to its logical consequences. The *comparatur* of Ulpian has become the *æquiparatur* of Lord Coke,<sup>4</sup> it might be said; ratification has been made equivalent to command, and that is all. But it will be seen that this is a very great step. It is a long way from holding a man liable as a wrongful disseisor when he has accepted the wrongfully-obtained possession, to allowing

<sup>1</sup> Godbolt, 109, 110, pl. 129; s. c. 2 Leon. 196, pl. 246 (M. 28 & 29 Eliz.); Hull v. Pickersgill, 1 Brod. & B. 282; Muskett v. Drummond, 10 B. & C. 153, 157; Buron v. Denman, 2 Exch. 167 (1848); Secretary of State in Council of India v. Kamachee Boye Sahaba, 13 Moore, P. C. 22 (1859), 86; Cheetham v. Mayor of Manchester, L. R. 10 C. P. 249; Wiggins v. United States, 3 Ct. of Cl. 412. But see Bro. Abr., *Trespass*, pl. 86; Fitz. Abr., *Bayllie*, pl. 4.

<sup>2</sup> Wolff v. Horncastle, 1 Bos. & P. 316 (1798). See further, Spittle v. Lavender, 2 Brod. & B. 452 (1821).

<sup>3</sup> Bract. 159 a, 171 b; Bro., *Trespass*, pl. 113; Bishop v. Montague, Cro. Eliz. 824; Gibson's Case, Lane, 90; Com. Dig., *Trespass*, c. 1; Sanderson v. Baker, 2 Bl. 832; s. c. 3 Wils. 309; Barker v. Braham, 2 Bl. 866, 868; s. c. 3 Wils. 368; Badkin v. Powell, Cowper, 476, 479; Wilson v. Tumman, 6 Man. & Gr. 236, 242; Lewis v. Read, 13 M. & W. 834; Buron v. Denman, 2 Exch. 167, 188; Bird v. Brown, 4 Exch. 786, 799; Eastern Counties Ry. v. Broom, 6 Exch. 314, 326, 327; Roe v. Birkenhead, Lancashire, & Cheshire Junction Ry., 7 Exch. 36, 44; Ancona v. Marks, 7 H. & N. 686, 695; Perley v. Georgetown, 7 Gray, 464; Condit v. Baldwin, 21 N. Y. 219, 225; Exum v. Bristler, 35 Miss. 391; G. H. & S. A. Ry. v. Donahoe, 56 Tex. 162; Murray v. Lovejoy, 2 Cliff. 191, 195. (See 3 Wall. 1, 9.)

<sup>4</sup> Co. Lit. 207 a; 4 Inst. 317. It is *comparatur* in 30 Ed. I. 128; Bract. 171 b.

him to make justifiable an act which was without justification when it was done, and, if that is material, which was followed by no possession on the part of the alleged principal.<sup>1</sup> For such a purpose why should ratification be equivalent to a previous command? Why should my saying that I adopt or approve of a trespass in any form of words make me responsible for a past act? The act was not mine, and I cannot make it so. Neither can it be undone or in any wise affected by what I may say.<sup>2</sup>

But if the act was done by one who affected to personate me, new considerations come in. If a man assumes the status of my servant *pro hac vice*, it lies between him and me whether he shall have it or not. And if that status is fixed upon him by my subsequent assent, it seems to bear with it the usual consequence as incident that his acts within the scope of his employment are my acts. Such juggling with words of course does not remove the substantive objections to the doctrine under consideration, but it does formally reconcile it with the general framework of legal ideas.

From this point of view it becomes important to notice that, however it may have been in the Roman law, from the time of the glossators and of the canon law it always has been required that the act should have been done in the name or as agent of the person assuming to ratify it. "Ratum quis habere non potest quod ipsius nomine non est gestum."<sup>3</sup> In the language of Baron Parke in *Buron v. Denman*,<sup>4</sup> "a subsequent ratification of an act done *as agent* is equal to a prior authority." And all the cases from that before Gascoigne downwards have asserted the same limitation.<sup>5</sup> I think we may well doubt whether ratification would ever have been held equivalent to command in the only cases in which that fiction is of the least importance had it not been for the further circumstance that the actor had assumed the position of a servant for the time being. The grounds for the doubt become stronger

---

<sup>1</sup> *Buron v. Denman*, 2 Exch. 167 (1848).

<sup>2</sup> Ratification had a meaning, of course, when the usual remedy for wrongs was a blood-feud, and the head of the house had a choice whether he would maintain his man or leave him to the vengeance of the other party. See the story of Howard the Halt, 1 Saga Library, p. 50, ch. 14, end. Compare "although he has not received him" in Fitz. Abr., *Corone*, pl. 428, cited 4 Harv. Law Rev. 355.

<sup>3</sup> Sext. Dec. 5, 12 de Reg. Jur. (Reg. 9). It made the difference between excommunication and a mere sin in case of an assault upon one of the clergy. Ibid. 5, 11, 23.

<sup>4</sup> 2 Exch. 167.

<sup>5</sup> *Supra*, pp. 11, 12, n. See also *Fuller & Trimwell's Case*, 2 Leon. 215, 216; *New England Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381, 382; Bract., fol. 28 b, 100 &

if it be true that the liability even for commanded acts started from the case of owner and slave.

In any event, ratification like the rest of the law of agency reposes on a fiction, and whether the same fiction or another, it will be interesting in the conclusion to study the limits which have been set to its workings by practical experience.

What more I have to say concerning the history of agency will appear in my treatment of the last proposition which I undertook to maintain. I said that finally I should endeavor to show that the whole outline of the law, as it stands to-day, is the resultant of a conflict between logic and good sense — the one striving to carry fictions out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust. To that task I now address myself.

I assume that common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility, — unless, that is to say, he has induced the immediate wrong-doer to do acts of which the wrong, or, at least, wrong, was the natural consequence under the circumstances known to the defendant. I assume that common-sense is opposed to allowing a stranger to my overt acts and to my intentions, a man of whom I have never heard, to set up a contract against me which I had supposed I was making with my personal friend. I assume that common-sense is opposed to the denial of possession to a servant and the assertion of it for a depositary, when the only difference between the two lies in the name by which the custodian is called. And I assume that the opposition of common-sense is intensified when the foregoing doctrines are complicated by the additional absurdities introduced by ratification. I therefore assume that common-sense is opposed to the fundamental theory of agency, although I have no doubt that the possible explanations of its various rules which I suggested at the beginning of this chapter, together with the fact that the most flagrant of them now-a-days often presents itself as a seemingly wholesome check on the indifference and negligence of great corporations, have done much to reconcile men's minds to that theory. What remains to be said I believe will justify my assumption.

I begin with the constitution of the relation of master and servant, and with the distinction that an employer is not liable for the

torts of an independent contractor, or, in other words, that an independent contractor is not a servant. And here I hardly know whether to say that common-sense and tradition are in conflict, or that they are for once harmonious. On the one side it may be urged that when you have admitted that an agency may exist outside the family relations, the question arises where you are to stop, and why, if a man who is working for another in one case is called his servant, he should not be called so in all. And it might be said that the only limit is found, not in theory, but in common-sense, which steps in and declares that if the employment is well recognized as very distinct, and all the circumstances are such as to show that it would be mere folly to pretend that the employer could exercise control in any practical sense, then the fiction is at an end. An evidence of the want of any more profound or logical reason might be sought in the different circumstances that have been laid hold of as tests, the objections that might be found to each, and in the fact that doubtful cases are now left to the jury.<sup>1</sup>

On the other hand, it might be said that the master is made answerable for the consequences of the negligent acts "of those whom the law denominates *his* servants, because," in the language of that judgment which settled the distinction under consideration,<sup>2</sup> "such servants represent the master himself, and their acts

---

<sup>1</sup> Among the facts upon which stress has been laid are the following: 1. Choice. *Kelly v. Mayor of New York*, 11 N. Y. 432, 436. See *Walcott v. Swampscott*, 1 Allen, 101, 103. But although it is true that the employer has not generally the choice of the contractor's servants, he has the choice of the contractor, yet he is no more liable for the contractor's negligence than for that of his servant. 2. Control. *Sadler v. Henlock*, 4 El. & Bl. 570, 578 (1855). Yet there was control in the leading case of *Quarman v. Burnett*, 6 M. & W. 499 (1840), where the employee was held not to be the defendant's servant. Cf. *Steel v. Lester*, 3 C. P. D. 121 (1877). 3. A round sum paid. But this was true in *Sadler v. Henlock*, *sup.*, where the employee was held to be a servant. 4. Power to discharge. *Burke v. Norwich & W. R.R.*, 34 Conn. 474 (1867). See *Lane v. Cotton*, 12 Mod. 472, 488, 489. But apart from the fact that this can only be important as to persons removed two stages from the alleged master, and not to determine whether a person directly employed by him is a servant or contractor, the power to discharge a contractor's servants may be given to the contractee without making him their master. *Reedle v. London & Northwestern Ry. Co.*, 4 Exch. 244, 258. *Robinson v. Webb*, 11 Bush (Ky.), 464. 5. Notoriously distinct calling. *Milligan v. Wedge*, 12 Ad. & E. 737 (1840); *Linton v. Smith*, 8 Gray (Mass.), 47. This is a practical distinction, based on common-sense, not directly on a logical working out of the theory of agency. Moreover, it is only a partial test. It does not apply to all the cases.

In doubtful cases the matter seems now to be left to the jury, that ever-ready sword for the cutting of Gordian knots, as difficult questions of law generally are.

<sup>2</sup> *Littledale, J.*, in *Laugher v. Pointer*, 5 B. & C. 547, 553 (T. 7 G. IV. 1826).

stand upon the same footing as his own." That although the limits of this identification are necessarily more or less vague, yet all the proposed tests go to show that the distinction rests on the remoteness of personal connection between the parties, and that as the connection grows slighter, the likeness to the original case of menials grows less. That a contractor acts in his own name and on his own behalf, and that although the precise point at which the line is drawn may be somewhat arbitrary, the same is true of all legal distinctions, and that they are none the worse for it, and that wherever the line is drawn it is a necessary one, and required by the very definition of agency. I suppose this is the prevailing opinion.

I come next to the limit of liability when the relation of master and servant is admitted to exist. The theory of agency as applied to free servants no doubt requires that if the servant commits a wilful trespass or any other wrong, when employed about his own business, the master should not be liable. No free man is servant all the time. But the cases which exonerate the master could never have been decided as the result of that theory alone. They rather represent the revolt of common-sense from the whole doctrine when its application is pushed far enough to become noticeable.

For example, it has been held that it was beyond the scope of a servant's employment to go to the further side of a boundary ditch, upon a neighbor's land, and to cut bushes there for the purpose of clearing out the ditch, although the right management of the master's farm required that the ditch should be cleaned, and although the servant only did what he thought necessary to that end, and although the master relied wholly upon his servant's judgment in the entire management of the premises.<sup>1</sup>

Mr. Justice Keating said, the powers given to the servant "were no doubt very wide, but I do not see how they could authorize a wrongful act on another person's land or render his employers liable for a wilful act of trespass." It is true that the act could not be authorized in the sense of being made lawful, but the same is true of every wrongful act for which the principal is held. As to the act being wilful, there was no evidence that it was so in any other sense than that in which every trespass might be said to be,

---

<sup>1</sup> *Bolingbroke v. Swindon Local Board*, L. R. 9 C. P. 575 (1874). Cf. *Lewis v. Read*, 13 M. & W. 834; *Haseler v. Lemoyne*, 5 C. B. N. S. 530.

and as the judge below directed a verdict for the defendant, there were no presumptions adverse to the plaintiff in the case. Moreover, it has been said elsewhere that even a wilful act in furtherance of the master's business might charge him.<sup>1</sup>

Mr. Justice Grove attempted to draw the line in another way. He said, "There are some things which may be so naturally expected to occur from the wrongful or negligent conduct of persons engaged in carrying out an authority given, that they may be fairly said to be within the scope of the employment." But the theory of agency would require the same liability for both those things which might and those which might not be so naturally expected, and this is only revolt from the theory. Moreover, it may be doubted whether a case could be found where the servant's conduct was more naturally to be expected for the purpose of accomplishing what he had to do.<sup>2</sup>

The truth is, as pretty clearly appears from the opinions of the judges, that they felt the difficulty of giving a rational explanation of the doctrine sought to be applied, and were not inclined to extend it. The line between right and wrong corresponded with the neighbor's boundary line, and therefore was more easily distinguishable than where it depends on the difference between care and negligence, and it was just so much easier to hold that the scope of the servant's employment was limited to lawful acts.

I now pass to fraud. It first must be understood that, whatever the law may be, it is the same in the case of agents, *stricto sensu*, as of other servants. As has been mentioned, the fraudulent servant was a factor in the first reported decision that the master was liable.<sup>3</sup> Now if the defrauded party not merely has a right to repudiate a contract fraudulently obtained, or in general to charge a defendant to the extent that he has derived a benefit from another's fraud, but may hold him answerable *in solidum* for the damage caused by the fraudulent acts of his servant in the course of the latter's employment, the ground can only be the fiction that the act of the servant is the act of the master.

It is true that in the House of Lords<sup>4</sup> Lord Selborne said that

<sup>1</sup> *Howe v. Newmarch*, 12 Allen, 49 (1866). See also cases as to fraud, *inf.*, and cf. *Craker v. Chicago & N. W. Ry. Co.*, 36 Wisc. 657, 669 (1875).

<sup>2</sup> Cf. *Harlow v. Humiston*, 6 Cowen, 189 (1826).

<sup>3</sup> *Hern v. Nichols*, 1 Salk. 289.

<sup>4</sup> *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 317, 326, 327 (1880).

the English cases "proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in *Barwick's case*<sup>1</sup>) "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." But this only puts off the evil day. Why is the principal answerable in the case of any other wrong? It is, as has been seen, because, in the language of Mr. Justice Littledale, the "servants represent the master himself, and their acts stand upon the same footing as his own."<sup>2</sup> Indeed Mr. Justice Willes, in the very judgment cited by Lord Selborne, refers to Mr. Justice Littledale's judgment for the general principle. So Lord Denman, in *Fuller v. Wilson*,<sup>3</sup> "We think the principal and his agent are for this purpose completely identified." I repeat more distinctly the admission that no fiction is necessary to account for the rule that one who is induced to contract by an agent's fraud may rescind as against the innocent principal. For whether the fraud be imputed to the principal or not, he has only a right to such a contract as has been made, and that contract is a voidable one. But when you go beyond that limit and even outside the domain of contract altogether to make a man answer for any damages caused by his agent's fraud, the law becomes almost inconceivable without the aid of the fiction. But a fiction is not a satisfactory reason for changing men's rights or liabilities, and common-sense has more or less revolted at this point again and has denied the liability. The English cases are collected in *Houldsworth v. City of Glasgow Bank*.<sup>4</sup>

When it was attempted to carry identification one step further still, and to unite the knowledge of the principal with the statement of the agent in order to make the latter's act fraudulent, as in *Cornfoot v. Fowke*,<sup>5</sup> the absurdity became more manifest and dissent more outspoken. As was most accurately said by Baron

---

<sup>1</sup> L. R. 2 Ex. 259.

<sup>2</sup> *Laugher v. Pointer*, 5 B. & C. 547, 553. See *Williams v. Jones*, 3 H. & C. 602, 609.

<sup>3</sup> 3 Q. B. 58, 67; s. c. reversed on another ground, but admitting this principle, *ib.* 77 and 1009, 1010 (1842).

<sup>4</sup> 5 App. Cas. 317. See *The Common Law*, p. 231.

<sup>5</sup> 6 M. & W. 358 (1840). It is not necessary to consider whether the case was rightly decided or not, as I am only concerned with this particular ground.



Wilde in a later case,<sup>1</sup> "The artificial identification of the agent and principal, by bringing the words of the one side by side with the knowledge of the other, induced the apparent logical consequence of fraud. On the other hand, the real innocence of both agent and principal repelled the notion of a constructive fraud in either. A discordance of views, varying with the point from which the subject was looked at, was to be expected." The language of Lord Denman, just quoted, from *Fuller v. Wilson*, was used with reference to this subject.

The restrictions which common-sense has imposed on the doctrine of undisclosed principal are well known. An undisclosed principal may sue on his agent's contract, but his recovery is subject to the state of accounts between the agent and third person.<sup>2</sup> He may be sued, but it is held that the recovery will be subject to the state of accounts between principal and agent, if the principal has paid fairly before the agency was discovered; but it is, perhaps, doubtful whether this rule or the qualification of it is as wise as the former one.<sup>3</sup>

Then as to ratification. It has nothing to do with estoppel,<sup>4</sup> but the desire to reduce the law to general principles has led some courts to cut it down to that point.<sup>5</sup> Again, the right to ratify has been limited by considerations of justice to the other party. It has been said that the ratification must take place at a time and under circumstances when the would-be principal could have done the act;<sup>6</sup> and it has been so held in some cases when it was manifestly just that the other party should know whether the act was to be considered the principal's or not, as in the case of an unauthorized notice to quit, which the landlord attempts to ratify after the time of the notice has begun to run.<sup>7</sup> But it is held that bringing an action may be subsequently ratified.<sup>8</sup>

<sup>1</sup> *Udell v. Atherton*, 7 H. & N. 172, 184 (1861).

<sup>2</sup> *Rabone v. Williams*, 7 T. R. 360 (1785); *George v. Clagett*, 7 T. R. 359 (1797); *Carr v. Hinchliff*, 4 B. & C. 547 (1825); *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38 (1873); *Semenza v. Brinsley*, 18 C. B. N. s. 467, 477 (1865); *Ex parte Dixon*, 4 Ch. D. 133.

<sup>3</sup> *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 610; *Irvine v. Watson*, 5 Q. B. D. 414.

<sup>4</sup> See *Metcalf v. Williams*, 144 Mass. 452, 454, and cases cited.

<sup>5</sup> *Doughaday v. Crowell*, 3 Stockt. (N. J.) 201; *Bird v. Brown*, 4 Exch. 788, 799.

<sup>6</sup> *Bird v. Brown*, 4 Exch. 788.

<sup>7</sup> *Doe v. Goldwin*, 2 Q. B. 143.

<sup>8</sup> *Ancona v. Marks*, 7 H. & N. 686.

I now take up pleading. It is settled that an assumpsit<sup>1</sup> to or by a servant for his master may be laid as an assumpsit to or by the master. But these are cases where the master has commanded the act, and, therefore, as I showed in the beginning of this discussion, may be laid on one side. The same thing is true of a trespass commanded by the master.<sup>2</sup> But when we come to conduct which the master has not commanded, but for which he is responsible, the difficulty becomes greater. It is, nevertheless, settled that in actions on the case the negligence of the servant is properly laid as the negligence of the master,<sup>3</sup> and if the analogy of the substantive law is to be followed, and the fiction of identity is to be carried out to its logical results, the same would be true of all pleading. It is so held with regard to fraud. "The same rule of law which imputes to the principal the fraud of the agent and makes him answerable for the consequences justifies the allegation that the principal himself committed the wrong."<sup>4</sup> Some American cases have applied the same view to trespass,<sup>5</sup> and have held that this action could be maintained against a master whose servant had committed a trespass for which he was liable although he had not commanded it. But these decisions, although perfectly reasonable, seem to have been due rather to inadvertence than to logic, in the first instance, and the current of authority is the other way. Baron Parke says, "The maxim '*Qui facit per alium, facit per se*' renders the master liable for all the negligent acts of the servant in the course of his employment, but that liability does not make the *direct* act of the servant the *direct* act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant."<sup>6</sup> Considered as reasoning, it would be hard to unite more errors in as many words. "*Qui facit per alium, facit per se*" as an axiom admitted by common-sense goes no farther than to make a man liable for commanded trespasses, and for them trespass lies. If it be extended beyond that point it simply embodies the fiction, and the

---

<sup>1</sup> Seignior and Wolmer's Case, Godbolt, 360.

<sup>2</sup> Gregory v. Piper, 9 B. & C. 591.

<sup>3</sup> Brucker v. Fromont, 6 T. R. 659 (1796).

<sup>4</sup> Comstock, Ch. J., in Bennett v. Judson, 21 N. Y. 238 (1860); acc. Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259 (1867).

<sup>5</sup> Andrew v. Howard, 36 Vt. 248 (1863); May v. Bliss, 22 Vt. 477 (1850).

<sup>6</sup> Sharrod v. London & N. W. Ry. Co., 4 Exch. 580, 585 (1849). Cf. Morley v. Gaisford, 2 H. Bl. 442 (1795).

precise point of the fiction is that the direct act of one is treated as if it were the direct act of another. To avoid this conclusion a false reason is given for the liability in general.<sup>1</sup> It is, as has been shown, the old fallacy of the Roman jurists, and is disposed of by the decisions that no amount of care in the choice of one's servant will help the master in a suit against him.<sup>2</sup> But although the reasoning is bad, the language expresses the natural unwillingness of sensible men to sanction an allegation that the defendant directly brought force to bear on the plaintiff, as the proper and formal allegation, when as a matter of fact it was another person who did it by his independent act, and the defendant is only answerable because of a previous contract between himself and the actual wrong-doer.<sup>3</sup> Another circumstance may have helped. Usually the master is not liable for his servant's wilful trespasses, and, therefore, the actions against him stand on the servant's negligence as the alternative ground on which anybody is responsible. There was for a time a confused idea that when the cause of action was the defendant's negligence, the proper form of action was always case.<sup>4</sup> Of course if this was true it applied equally to the imputed negligence of a servant. And thus there was the farther possibility of confounding the question of the proper form of action with the perfectly distinct one whether the defendant was liable at all.

I come finally to the question of damages. In those States where exemplary damages are allowed, the attempt naturally has been made to recover such damages from masters when their servants' conduct has been such as to bring the doctrine into play. Some courts have had the courage to be consistent.<sup>5</sup> "What is the principle," it is asked, "upon which this rule of damages is founded? It is that the act of the agent is the act of the principal himself. . . . The law has established, to this extent, their legal unity and identity. . . . This legal unity of the principal

---

<sup>1</sup> The same reason is given in *M'Manus v. Crickett*, 1 East, 106, 108 (1800). Compare 1 Harg. Law Tracts, 347; *Walcott v. Swampscott*, 1 Allen, 101, 103; *Lane v. Cotton*, 12 Mod. 472, 488, 489.

<sup>2</sup> *Dansey v. Richardson*, 3 El. & Bl. 144, 161. See p. 15.

<sup>3</sup> *M'Manus v. Crickett*, 1 East, 106, 110 (1800); *Brucker v. Fromont*, 6 T. R. 659 (1796).

<sup>4</sup> *Ogle v. Barnes*, 8 T. R. 188 (1799). Cf. *Leame v. Bray*, 3 East, 593 (1803).

<sup>5</sup> *New Orleans, Jackson, & Great Northern R. R. Co. v. Bailey*, 40 Miss. 395, 452, 33, 456 (1866); acc. *Atlantic & G. W. Ry. Co. v. Dunn*, 19 Ohio St. 162.

and agent, in respect to the wrongful or tortious, as well as the rightful acts, of the agent, done in the course of his employment, is an incident which the law has wisely attached to the relation, from its earliest history." "If then the act of the agent be the act of the principal in law, and this legal identity is the foundation of the responsibility of the principal, there can be no escape from his indemnity to the full extent of civil responsibility." An instruction that the jury might give punitive damages was upheld, and the plaintiff had judgment for \$12,000. Whatever may be said of the practical consequences or the English of the opinion from which these extracts are made, it has the merit of going to the root of the matter with great keenness. On the other hand, other courts, more impressed by the monstrosity of the result than by the *elegantia juris*, have peremptorily declared that it was absurd to punish a man who had not been to blame, and have laid down the opposite rule without hesitation.<sup>1</sup>

I think I now have made good the propositions which I undertook at the beginning of this essay to establish. I fully admit that the evidence here collected has been gathered from nooks and corners, and that although in the mass it appears to me imposing, it does not lie conspicuous upon the face of the law. And this is equivalent to admitting, as I do, that the views here maintained are not favorites with the courts. How can they be? A judge would blush to say nakedly to a defendant: "I can state no rational ground on which you should be held liable, but there is a fiction of law which I must respect and by which I am bound to say that you did the act complained of, although we both know perfectly well that it was done by somebody else whom the plaintiff could have sued if he had chosen, who was selected with the utmost care by you, who was in fact an eminently proper person for the employment in which he was engaged, and whom it was not only your right to employ, but much to the public advantage that you should employ." That would not be a satisfactory form in which to render a decision against a master, and it is not pleasant even to admit to one's self that such are the true grounds upon which one is deciding. Naturally, therefore, judges have striven to find more intelligible reasons, and have done so in the utmost good faith; for

---

<sup>1</sup> *Hagar v. Providence & Worcester R. R.*, 3 R. I. 88 (1854); *Cleghorn v. New York Central & Hudson River R. R.*, 56 N. Y. 44 (1874). Cf. *Craker v. Chicago & N. W. R. R.*, 36 Wis. 657 (1875).

whenever a rule of law is in fact a survival of ancient traditions, its ancient meaning is gradually forgotten, and it has to be reconciled to present notions of policy and justice, or to disappear.

If the law of agency can be resolved into mere applications of general and accepted principles, then my argument fails; but I think it cannot be, and I may suggest, as another ground for my opinion beside those which I have stated heretofore, that the variety of reasons which have been offered for the most important application of the fiction of identity, the liability of the master for his servant's torts, goes far to show that none of those reasons are good. Baron Parke, as we have seen, says that case is brought in effect for employing a negligent servant. Others have suggested that it was because it was desirable that there should be some responsible man who could pay the damages.<sup>1</sup> Mr. Justice Grove thinks that the master takes the risk of such offences as it must needs be should come.

I admit my scepticism as to the value of any such general considerations, while on the other hand I should be perfectly ready to believe, upon evidence, that the law could be justified as it stands when applied to special cases upon special grounds.<sup>2</sup>

There should have been added to the illustrations of a man's responsibility within his house, given in the former article at p. 360, that of a vassal for attempts on the chastity of his lord's daughter or sister "*tant com elle est Damoiselle en son Hostel*," in Ass. Jerusalem, ch. 205, 217, ed. 1690. The origin of the liability of innkeepers never has been studied, so far as I know. Beaumanoir, c. 36, seems to confine the liability to things intrusted to the innkeeper, and to limit it somewhat even in that case, and to suggest grounds of policy. The English law was more severe, and put it on the ground that the guest for the time had come to be under the innkeeper's protection and safety. 42 Ass., pl. 17, fol. 260. A *capias* was refused on the ground that the defendant was not in fault, but an *elegit* was granted. 42 Ed. III. II, pl. 13. Notwithstanding the foregoing reason given for it, the liability was confined, at an early date, to those exercising a common calling (*common hostler*). 11 Hen. IV. 45, pl. 18. See The Common Law, 183-189, 203. See further, 22 Hen. VI. 21, pl. 38; ib. 38, pl. 8. And note a limitation of liability in cases of taking by the king's enemies, similar to that of bailees. Plowden, 9, and note in margin; The Common Law, 177, 182, 199, 201. The references to the custom of England, or to the *lex terræ*, are of no significance. The Common Law, 188. See further, the titles of Glanville and Bracton. Other citations could be given if necessary.

Oliver Wendell Holmes, Jr.

---

<sup>1</sup> See *Williams v. Jones*, 3 H. & C. 256, 263; 1 Harg. Law Tracts, 347.

<sup>2</sup> Cf. what is said as to common carriers in The Common Law, 204, 205.

## THE PRIVILEGE OF WITNESSES IN FEDERAL COURTS AGAINST COMPULSORY SELF-INCRIMINATION.

---

THE right of a witness, under the Constitution and Laws of the United States, to refuse to give evidence tending to incriminate himself, has recently been passed upon by both the Circuit and the District Court of the United States for the Northern District of Illinois. The question arose, in the course of an investigation by the Federal grand jury into certain alleged offences against the Interstate Commerce Law, in the course of which certain prominent merchants and railroad officials of the city of Chicago, summoned as witnesses before the grand jury, refused to answer certain questions propounded, and refused to produce certain books and papers called for, on the ground that they would criminate, or tend to criminate, themselves by so doing.

The District Court, on the matter being called to its attention, and after argument of counsel in behalf of the witnesses, ruled that the witnesses must give the evidence called for; and, the witnesses still persisting in their refusal, committed them for contempt. The Circuit Court was immediately appealed to to release witnesses on *habeas corpus*, but refused so to do, after full argument and mature deliberation. An appeal has been taken from the decisions of the Circuit Court in the *habeas corpus* cases to the Supreme Court, which appeal is still pending.

The decisions of both Circuit and District Courts were based upon a statute of the United States (R. S. U. S. § 860), which provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture; provided, that this section shall not exempt any party or witness from prosecution

and punishment for perjury committed in discovering or testifying as aforesaid."

This statute, it was held, abrogated the privilege of witnesses to refuse to furnish self-incriminatory evidence, because it protected the witness from any unfair use against him of the evidence furnished,—that it took away the reason of the privilege, and, with the reason, the privilege itself.

The question raised has never been passed upon by the United States Supreme Court. There are, however, several decisions and dicta of the lower Federal courts, all in accord with the decisions of the Circuit and District Court of the Northern District of Illinois.<sup>1</sup>

In accord, also, are the decisions of various State courts, notably the Courts of Appeals of New York.<sup>2</sup>

In opposition to these cases are the case of Henry Emery, 107 Mass. 172, and a few other State decisions.<sup>3</sup>

As none of these cases are of binding authority upon the Supreme Court, and the question will be considered *rem integrum* by that body, it seems that, at this stage, a discussion of the question upon principle is not out of place. In such a discussion, one of the first considerations that arises is, whether there exists in the Federal constitution any sanction or guarantee of the witness' privilege against being compelled to incriminate himself. There appears to be no such guarantee stated in express and unambiguous terms. The provision most closely applicable is one of the clauses of the fifth amendment, which provides that "no person shall be compelled, in any criminal case, to be a witness against himself." This language, in its most obvious interpretation, would seem only to prohibit compelling a defendant in a criminal action to become a witness against himself in such action. Still, by another interpretation, by construing the words "criminal case" as meaning "a matter involving criminal guilt," and the words "to be a witness" as meaning "to furnish evidence," the lan-

---

<sup>1</sup> U. S. v. Brown, 1 Sawyer, 531; U. S. v. McCarthy, 21 Blatch. 470; U. S. v. Williams, 15 Int. Rev. Record, 199; *In re* Phillips, 2 Am. L. Times, 154.

<sup>2</sup> *People v. Hackley*, 24 N. Y. 74; *People v. Sharp*, 107 N. Y. 427; *La Fontaine v. Southern Underwriters*, 83 N. Car. 132; *State v. Quarles*, 13 Ark. 307; *Kneeland v. State*, 62 Ga. 395; *Higdon v. Heard*, 14 Ga. 255; *Wilkins v. Malone*, 14 Ind. 153.

<sup>3</sup> *Cullen v. Commonwealth*, 24 Gratt. (Va.) 624; *Kendrick v. Commonwealth*, 78 Va. 490; *State v. Nowell*, 58 N. H. 314; *State v. Warner*, 13 Lea (Tenn.), 52 (opinion of Turney, J.).

guage can be made to cover the privilege of a witness against being compelled to criminate himself, as well as the right of a defendant in a criminal case to refuse to testify in that case. This latter interpretation is the one placed upon the same language in the New York constitution by Judge Denio, in the case of *People v. Hackley*, and it is believed that it is the one the Supreme Court would adopt. The Supreme Court construes the provisions of the Bill of Rights broadly in favor of personal right and liberty.<sup>1</sup>

The Bill of Rights was intended to cover all the principles of personal right established by the common law and the constitutional history of England, and it would certainly be strange if a principle so old, so ingrained in and so characteristic of the common law, as that against compelling self-incriminatory evidence, should not be held to find complete expression and guaranty in some constitutional provision. The provisions above quoted, by the first interpretation, would cover only a special case of the principle prohibiting the compulsion of self-incriminatory evidence; by the last it would cover the entire principle. It is certainly most probable that this latter interpretation is the one the Supreme Court will adopt.<sup>2</sup>

Let us assume, then, that the fifth amendment guarantees the privilege against compulsory self-accusatory evidence. Two questions, then, arise: 1st. Can the privilege so guaranteed be abrogated by statute? 2d. If it can, does the statute in question in fact abrogate it? As to the first question, it seems hard to see how the privilege, if guaranteed by constitutional provision, can be abrogated by statute, unless (as is possible) the privilege and the constitutional guaranty of it cover only the case where the witness runs the risk of punishment for the crime which his evidence would disclose. The weight of authority is that the privilege so guaranteed can be abrogated by statute if the statute affords the witness complete amnesty as to the crime concerning which he was compelled to testify.<sup>3</sup>

<sup>1</sup> See the *Boyd* case, 116 U. S., where the majority of the court held that a statute compelling a defendant in a criminal case to produce books, etc., violated the constitutional provision prohibiting unreasonable searches.

<sup>2</sup> In support of this interpretation see *People v. Hackley*, 24 N. Y. 74; *Kneeland v. State*, 62 Ga. 395; *State v. Quarles*, 13 Ark. 307; *U. S. v. Brown*, 1 Sawyer, 531, 537.

<sup>3</sup> *Emery's Case*, 107 Mass. 172; *State v. Nowell*, 58 N. H. 314; *Commonwealth v. Kendrick*, 78 Va. 490; but see *State v. Warner*, 13 Lea (Tenn.), 52.



It has been held that when the crime has been barred by the Statute of Limitations, witness may be compelled to testify.<sup>1</sup>

So where crime has been pardoned, witness may be compelled to testify.<sup>2</sup>

But if the privilege, though guarded by constitutional sanction, can be abrogated by statute, clearly it can only be abrogated by a statute giving the witness protection at least equal to that afforded by the privilege itself. This brings us to the second question above proposed, Does the statute in question in fact abrogate the privilege as guaranteed by the constitution? What protection does the statute furnish? It provides that the discovery or evidence given by the witness shall not be "given in evidence, or in any manner used against him," in any criminal proceeding. All that this language seems to mean is, that admissions or confessions contained in such discovery or evidence shall not be used against the person furnishing it. It protects the witness from the use of his evidence as an admission in any criminal proceeding against him. It would not prevent sources of evidence disclosed by his evidence from being used against him. For instance, the witness testifies that he, with A, B, and C, committed a murder; that the deed was done with a knife belonging to witness, which he afterward hid in a place which witness describes in his testimony so that the knife can be found. Witness' admissions cannot, under the statute, be used against him on his subsequent indictment and trial for murder; but there is nothing in the statute which would prevent the prosecution from producing the blood-stained knife and proving that it belonged to witness, or from calling A, B, and C to testify as to witness' complicity in the affair. It might, then, easily be that witness would be convicted without the need of his admissions, by evidence the sources of which were pointed out by his evidence. And in such a case the protection of the statute would be of no avail to him. Let us now consider what protection the privilege to refuse to incriminate himself would have afforded witness.

The privilege to refuse to give self-accusatory evidence is very broad. It covers not only the main incriminatory facts, but all minor and subordinate facts, not incriminatory in themselves, but

---

<sup>1</sup> *Mahanke v. Cleland*, 76 Iowa, 401; *Close v. Olney*, 1 Denio, 319; *Weldon v. Bench*, 12 Ill. 374. *Contra*, see *McFadden v. Reynolds*, 11 Atl. Rep. 638.

<sup>2</sup> *Regina v. Boyes*, 1 B. & S. 311.

which, in connection with other facts, would incriminate him.<sup>1</sup> It is enough to sustain witness' privilege that the evidence sought would or might tend to incriminate him.<sup>2</sup> And, in general, his mere oath that evidence sought from him would tend to incriminate him is enough to entitle witness to his privilege,<sup>3</sup> subject, according to some authorities, to the right of the court to refuse to allow the privilege in a case where it can see that the evidence sought cannot incriminate the witness.<sup>4</sup> Under these rules it is plain that the witness in the murder case supposed could have refused to give any evidence whatever bearing upon the murder, and that by so refusing he might perhaps have concealed his guilt forever. But if the privilege afforded, or might afford, greater protection to the witness than that provided by the statute, what becomes of the argument that the statute has taken away the reason of the privilege.

The question can be looked at in another and even clearer light. We have seen that the statute simply protects the witness from the use of his evidence as an admission or confession in a subsequent criminal proceeding against him. Now, by the common law, when a witness was compelled against his claim of privilege, properly made, to furnish self-incriminatory evidence, such evidence was not permitted to be used against him as his admissions, on the ground that such admissions were not voluntary.<sup>5</sup> This is precisely the protection afforded by the statute. How can it be claimed that the privilege is abrogated by a statute which affords only the same protection that the law would have

---

<sup>1</sup> *Wigram, Discovery*, p. 63; *East India Co. v. Campbell*, 1 Ves. Sr. 246; *Cates v. Hardacre*, 3 Taunt. 424; *People v. Mather*, 4 Wend. 229; *Masters v. Prentiss*, 2 Jones, Eq. (N. Car.) 62; *Wharton, Evidence*, sect. 533; *State v. Edwards*, 2 N. & McCord, L. (S. Car.) 13; *Poole v. Perritt*, 1 Spears, L. (S. Car.) 121; *In re Graham*, 8 Ben. 419.

<sup>2</sup> *Coburn v. Odell*, 30 N. H. 540, 555; *Janvrin v. Scammon*, 29 N. H. 280; *State v. Edwards*, 2 N. & McC., L. (S. Car.) 13.

<sup>3</sup> *Warner v. Lucas*, 10 Ohio, 336; *Chamberlain v. Willson*, 12 Vt. 491; 9 *Criminal Law Mag.* 293, 302, 303; *Janvrin v. Scammon*, 29 N. H. 280; *People v. Mather*, 4 Wend. 229; *Poole v. Perritt*, 1 Spears, Law (S. Car.), 121.

<sup>4</sup> *Regina v. Boyes*, 1 B. & S. 311; *People v. Mather*, 4 Wend. 229; 1 *Aaron Burr Trial* (Cockcroft's edn.), p. 251 *et seq.*; *Richmond v. State*, 2 C. E. Greene (Iowa), 532; *People v. Smith*, 20 Ill. App. 591.

<sup>5</sup> *Schœffer v. State*, 3 Wis. 820; *People v. Mondon*, 103 N. Y. 211; *Douglass v. Wood*, 1 Swan (Tenn.), 391, 395; *State v. Broughton*, 7 Ired. L. (N. Car.) 96, 101; *Regina v. Garbett*, 1 Denison, C. C. 236; *Reg. v. Coote*, L. R. 4 P. C. 599, 607; *Whar. Crim. Evid.*, § 665.

afforded without any statute at all, in case the witness had been compelled to testify against his claim of privilege? <sup>1</sup>

The Emery Case, *supra*, which held that the privilege of a witness against being compelled to incriminate himself could not be removed by a statute merely providing that the testimony of the witness could not be used against him in any subsequent criminal proceeding, professes to distinguish the case of *People v. Hackley*, *supra*, by reason of a difference of the wording in the two State constitutions. The Massachusetts constitution provided expressly that no witness should be compelled to furnish evidence against himself, while the New York constitution had substantially the same provision as that of the Federal constitution above referred to and commented on. But the distinction made seems a very unsubstantial one. The language of the Massachusetts constitution does not, it would seem, include anything more than common-law privilege; nor should the language of the New York Constitution, if it be construed to touch the privilege at all (and it is conceded in the Hackley Case that it should be so construed), include anything less. In truth, the question is one involving important and fundamental principles of personal right, and should be determined by the spirit, not the letter, of constitutional provisions.

The discussion has thus far proceeded on the theory that the statute in question in some way has the effect of compelling a witness to give self-accusatory evidence. It does not in terms purport to do so, and it is not at all easy to see why it should have that effect. It appears on its face merely to prohibit a certain sort of use of evidence when given, and not to relate at all to the compelling of evidence. Apparently the argument by which a provision compelling witnesses to give self-accusatory evidence is read into the statute is about as follows: The general rule is that all witnesses must furnish evidence called for from them. The exception is that they need not criminate themselves. The

---

<sup>1</sup> It is interesting to note in this connection that modern English statutes, taking away the right of witness to refuse to give self-accusatory evidence, seem, as far as the writer has been able to ascertain from a hasty investigation, invariably to provide that the witness shall not be tried for the offence to which the testimony relates (see 2 Taylor, *Evidence* (7th edn.), sect. 1455, and statutes there cited), showing, it would seem, that English constitutional law does not regard prohibiting the use of the evidence as a sufficient substitute for the privilege. See also *Emery's Case*, 107 Mass. 172; *Commonwealth v. Cullen*, 24 Gratt. (Va.) 624.

statute has removed the reason for the exception, which, therefore, falls, leaving the general rule in force freed from the exception. But such reasoning seems artificial to the last degree in a question of the interpretation of a statute. Heretofore witnesses could not be compelled to give self-incriminatory evidence. It would seem that if the statute had been intended to change the rule, it would have provided in terms that witnesses could be compelled to give such evidence, more especially since the change was in derogation of a well-settled principle of personal right.<sup>1</sup> The statute is susceptible of a perfectly reasonable construction, leaving the privilege intact, viz., of extending to witnesses voluntarily giving self-incriminatory evidence the same protection that the common law afforded a witness compelled to give such evidence on compulsion against his claim of privilege.

*Louis M. Greeley.*

CHICAGO, ILL., March 19, 1891.

---

## CONSTITUTIONAL CHECKS UPON MUNICIPAL ENTERPRISE.

---

"WE have established, we think, beyond cavil," said Judge Miller in *Loan Association v. Topeka*, 20 Wall. 655, 664 (1874), "that there can be no lawful tax which is not laid for a public purpose." This rule possibly narrows the discussion by shifting it from the question what is a lawful tax, to the question what is a public purpose; but the difficulty of application still remains, and is well shown by the case itself which states the rule. That case holds that a law of Kansas authorizing the city of Topeka to encourage by the payment of bounties the establishment of manufactories and "such enterprises as may tend to develop and improve such city," is unconstitutional. Later decisions are to the same effect.<sup>2</sup>

On the other hand, the same court has repeatedly held that

---

<sup>1</sup> *Hare on Discovery*, p. 137, citing *Orme v. Crockford*, 13 Price, 376, and other cases.

<sup>2</sup> *Parkersburg v. Brown*, 106 U. S. 487; *Cole v. LaGrange*, 113 U. S. 1.

railroad corporations and "public" grist-mills are proper objects of municipal aid.<sup>1</sup>

It appears, therefore, that the true line of cleavage lies somewhere between a cotton factory and a grist-mill.

Talbot *v.* Hudson, 16 Gray, 417 (1860), Lowell *v.* Boston, 111 Mass. 454 (1873), and the *Opinion of the Justices*, 150 Mass. 592 (1890), when read together, are somewhat perplexing. The ground of decision in each of the first two cases appears to be flatly contradicted by the case itself which follows, and yet one may search the opinions in vain for any recognition of a conflict.

Talbot *v.* Hudson held that a statute authorizing the abatement of a dam on Concord River for the relief of the meadows above was a valid exercise of the right of eminent domain, although the benefit to the owners of the meadows was individual and private, because "the incidental advantage arising from the development of the agricultural resources of so extensive a territory" was public (p. 425).

Lowell *v.* Boston held that the Legislature could not authorize the city of Boston to lend money to the owners of land in the Burnt District for the encouragement of rebuilding, because "the promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is in its essential character a private and not a public object" (p. 461).

In the course of his opinion Judge Wells expresses his approval of the judgment in Talbot *v.* Hudson and of the "general principle upon which it is founded," although it is clear that he has done his best to knock away the single prop, that of incidental public advantage, upon which that case was supported.

The *Opinion of the Justices* holds that the Legislature may authorize cities and towns to manufacture gas and electric light for sale to their inhabitants. The learned justices refer with apparent approval to the proposition laid down in Lowell *v.* Boston: "The essential point is that a public service or use affects the inhabitants as a community and not merely as individuals" (p. 595). Yet it seems quite clear that the sale of electric

---

<sup>1</sup> Rogers *v.* Burlington, 3 Wall. 655; Olcott *v.* Supervisors, 16 Wall. 678; Otoe County *v.* Baldwin, 111 U. S. 1; Burlington *v.* Beasley, 94 U. S. 310; Blair *v.* Cuming County, 111 U. S. 363.

light to private individuals, for use in their private houses, affects the inhabitants as individuals, and not as a community.

These perplexities are not referred to for the purpose of throwing doubt upon the cases themselves; but they serve to show how much easier it is to come to a sound conclusion than to write a safe opinion.

It remains to be considered whether there is any principle by which the cases may fairly be reconciled.

Judge Wells, in contending that incidental public benefits could not be regarded, assumed that the right to take property for public purposes, and the right to tax for public purposes, must be subjected to the same tests. He found it necessary, therefore, to deal with the mill acts. Under these acts a riparian owner may erect a mill-dam on his premises, and flood the meadows of his neighbor above, upon the payment of damages to be assessed by a jury. The learned judge contended that this was not an exercise of the right of eminent domain, because "no private property, or right in the nature of property, is taken by force of mill acts either for public or private use." It seems that Judge Shaw and Judge Wells must share the responsibility for the astounding proposition that A can convert B's mowing land into a mill-pond without taking away his property.<sup>1</sup>

It is now settled, however, that the right to flow under the mill acts is an interest in lands.<sup>2</sup>

It follows that these acts do authorize the taking of property, and must be supported, if at all, either as an exercise of the right of eminent domain expressly given, or as a "regulation for the public good" impliedly given, because it is found so inconvenient in practice to get along without it. For, it seems, you may establish a right of way through the constitution by necessity. An interesting exposition of this latter theory is found in the opinion of Mr. Justice Gray in *Head v. Amoskeag Manufacturing Co.*, 113 U. S. 9.

It was held in *Ryerson v. Brown*, 35 Mich. 333 (1877), that mill acts similar to those in Massachusetts were unconstitutional, not, however, upon the ground that incidental advantages to the public could not be considered, but upon the ground that before

---

<sup>1</sup> *Murdock v. Stickney*, 8 Cush. 116.

<sup>2</sup> *Isele v. Arlington Savings Bank*, 135 Mass. 142; *Kenison v. Arlington*, 144 Mass. 456.

the power of forcible appropriation could be invoked there must appear to be some necessity for its exercise.

Chief Justice Cooley said in that case: "We are not disposed to say that the incidental benefits to the public would not under any circumstances justify the exercise of the right of eminent domain. The rules which underlie taxation do not necessarily govern the case. Taxation is for those purposes which properly and legitimately are designated public purposes; but the authority of the State to compel the sale of individual property for the use of enterprises in which the interest of the public is only to be subserved through conveniences supplied by private corporations or individuals, has been too long recognized to be questioned."

The distinction here suggested seems reasonable. If it had been taken by the court in *Lowell v. Boston*, much trouble might have been avoided. The right of the state to grant a location to a corporation for which the corporation must pay, and its right to subsidize that corporation, do not seem to be necessarily coextensive in principle, and, as juries go now-a-days, they certainly are not the same in effect.

Since it is now settled that a town may be authorized to sell water, gas, and electric light to such of its individual householders as see fit to buy, it is evident that the individuals who make up the community cannot be distinguished from the community in its collective capacity, for the purpose of fixing the limits of taxation. But if a town may sell water and electric light to its inhabitants, why not bread? Is not bread quite as necessary for the "comfortable living of every person" as artificial light? Upon what ground shall it be said that the Legislature may not empower towns and cities to deal in all sorts of commodities which its citizens may need? There seems to be no tenable ground of distinction, except that suggested by Judge Cooley in regard to the exercise of the right of eminent domain; namely, necessity.

The right of the town to perform a given service for its several inhabitants for which its inhabitants severally pay, depends not upon the nature of the thing supplied, nor upon the universality of its use, but upon the mode of supply; upon the economical necessity for organization and system in the performance of the service. The very object of municipal organization is to perform those services for the common benefit, for which organization of some sort, if not political, then voluntary, is necessary. The

right of the town to supply water to its inhabitants by means of individual wells to be dug in individual back-yards has never been asserted. Upon the other hand, if in the progress of the arts it ever becomes necessary for food to be supplied to the householders through pipes, there can be no doubt that towns will be permitted to pipe their streets for the purpose. "In general, it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and *cannot be successfully dealt with without the aid of powers derived from the Legislature*, may be subjected to municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is the interest of each inhabitant that others as well as himself should possess and enjoy them."<sup>1</sup>

In view of the *Opinion* itself, from which this passage is quoted, it can hardly be contended that the qualifications last stated are in every case essential. It cannot be said that each inhabitant, at present, needs the electric light for his own house, or that he is interested in having it for his neighbor's house, except as he is interested in having his neighbor, if he happens to be hospitable, well supplied with wines and cigars. Without these qualifications the rule is sufficiently flexible to enable the State at all times to protect its towns and cities against the exactions of private monopoly, while, on the other hand, public bakeries and dry-goods stores, under existing conditions, at any rate, are fairly barred.

*Fabes Fox.*

---

<sup>1</sup> Opinion of the Justices, 150 Mass. 597.



# HARVARD LAW REVIEW.

---

Published monthly, during the Academic Year, by Harvard Law Students.

---

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

---

## *Editorial Board.*

OLIVER PRESCOTT, JR., . . .	<i>Editor-in-Chief.</i>
PHILIP S. ABBOT, <i>Treasurer,</i>	RICHMOND O. AULICK,
ALBERT S. BARD,	ALBERT E. HADLOCK,
EVAN H. HOPKINS,	CARLETON HUNNEMAN,
FREDERICK B. JACOBS,	M. DAY KIMBALL,
JAMES G. KING,	JAMES M. NEWELL,
WILLIAM F. PILLSBURY.	

---

GIFT OF A CHOSE IN ACTION. — That a court of equity will not support an imperfect gift as a declaration of trust, and that a valid gift of a chose in possession can be effected only by deed, or by a delivery of the chattel, are now established doctrines in England and in this country. The American rule as to the requisites of a gift of sealed obligations and mercantile specialties is also simple and uniform. There must be a transfer, either by deed or by delivery, of the document containing the obligation. A transfer in either mode passes the title to the document, as distinguished from the chose in action, and carries with it an irrevocable power of attorney to the transferee to collect the claim in the name of the obligee, but for his own use. This rule has been applied to bonds, notes, policies of insurance, certificates of stock, savings-bank books, lottery tickets, and the like.

In England, however, until recently, it has seemed impossible to deduce any satisfactory rule from the conflicting decisions. In *Edwards v. Jones*, 1 M. & Cr. 226, which was followed in *Searle v. Law*, 15 Sim. 95, and cited with approval in *Re Richardson*, 30 Ch. Div. 396, 401, 404, the gift of a bond was deemed ineffectual, although the bond was delivered and bore an indorsement, signed by the donor, and expressing the usual power of attorney to sue. In *Bissey v. Flight*, 24 W. R. 957, also, a donee gained no interest in a certificate of stock, although the transfer was by deed containing a power of attorney. On the other hand, gifts of a policy of insurance (*Fortescue v. Barnett*, 3 M. & K. 36; *Sewell v. King*, 14 Ch. D. 179) and of a promissory note (*Richardson v. Richardson*, 3 Eq. 686) have been upheld, the gift being by deed with a power of attorney.

The case of *In re Patrick* (1891), 1 Ch. 82, goes far to remove this inconsistency in the English decisions. A donor, who made a voluntary assignment of certain specialty debts by a deed containing a power of attorney, but who afterwards collected the debts, was compelled to account to the donee for the money so collected. *Edwards v. Jones* and *Bissey v. Flight* must therefore be regarded as overruled. In view of this late decision, it seems not unreasonable to expect that the English courts may see their way to dispense with an express power

of attorney, where, as in the case of a gratuitous delivery of a specialty, such a power is fairly to be implied. The arbitrary distinction now existing between gifts *inter vivos* and *donationes mortis causa* would thereby disappear. We should also have, on both sides of the Atlantic, a just, simple, and uniform rule as to gifts of choses in action.

INEVITABLE ACCIDENT A DEFENCE TO ACTION OF TRESPASS. — The rule, so well settled in America,<sup>1</sup> that inevitable accident is a good defence to an action of trespass for personal injuries, has not hitherto found entire favor with the English courts. There crept very early into the English law a principle, which the courts have been slow to repudiate, to the effect that he who acts voluntarily acts at his peril, and is responsible for personal injuries to another resulting from his acts, though the injury be the outcome neither of wilful wrongdoing nor of negligence.<sup>2</sup> The few cases in which a defence has been allowed have been decided either upon principles of expediency or upon questions of pleading. For example, in *Holmes v. Mather*,<sup>3</sup> where the plaintiff was knocked down by the defendant's runaway horses, it was held that such an accident was one of the ordinary risks of the road, which a person travelling upon the road took upon himself. In *Fletcher v. Rylands*<sup>4</sup> Lord Blackburn remarks that all the cases "in which inevitable accident has been held an excuse for what *prima facie* was a trespass, can be explained on the principle that the circumstances were such as to show that the plaintiff had taken that risk upon himself." That is, the English judges have obstinately refused to adopt squarely the reasoning of the American courts, that where a man uses due care he is not responsible for results which could not have been foreseen, and, while practically arriving at the same results in a number of cases, have based their decisions upon narrow and unsatisfactory grounds.

It is refreshing, therefore, to find Justice Denman, in the recent case of *Stanley v. Powell*,<sup>5</sup> facing the music squarely and holding that, in the absence of negligence, a man who accidentally shoots another is not liable in an action of trespass. He reviews the English cases upon the subject, and concludes that the bulk of authority in favor of the opposite view may be sifted down to a few dicta or decisions which went off on other grounds. In commenting upon the well-known case of *Weaver v. Ward*<sup>6</sup> Justice Denman says: "I can find nothing in the report to show that the court held that in order to constitute a defence in the case of a trespass it is necessary to show that the act was inevitable. If inevitable, it would seem that that was a defence under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what *Weaver v. Ward* really lays down is that 'no man shall be excused of a trespass except it may be judged utterly without his fault.'" Further on, in reference to the case at bar, he says: "It was argued that inasmuch as the plaintiff was injured by a shot from defendant's gun, that was an injury owing to an act of force committed by defendant, and therefore an action would lie. I am of opinion that this is not so, and that to any statement of claim which the plaintiff could suggest the defendant must

<sup>1</sup> *Brown v. Kendall*, 6 Cush. 292.

<sup>2</sup> L. R. 10 Ex. 261.

<sup>3</sup> 31 W. R. 77.

<sup>4</sup> Year Book, 21 Hen. VII, p. 28 a.

<sup>5</sup> L. R. 1 Ex. 265, at 287.

<sup>6</sup> Hob. 134.

succeed if the defendant pleaded " that he was guilty of no negligence. It is rather noteworthy that Justice Denman makes no reference to Lord Blackburn's remark in *Fletcher v. Rylands*, above quoted.

*Stanley v. Powell* may be considered as definitely settling the English law upon the subject; and though no mention was made by Justice Denman of the leading American cases, it is not too strong an inference to suppose that he must have had them in mind, and was influenced by their practical, common-sense doctrine.

---

EMPLOYER'S LIABILITY FOR INJURIES RESULTING FROM DEFECTIVE MACHINERY. — It is established law that an employer is bound to use ordinary care to keep in a reasonably safe condition the place where his employees are required to work. It is equally well established that an employee assumes all risks incident to the service into which he enters. But where a negligent breach of duty on the part of the employer augments the hazards of the service, the employee may hold the employer accountable, unless, by voluntarily continuing in the employer's service, he has assumed such danger. The master is still responsible when he has been negligent, even though the negligence of a fellow-servant may have concurred in bringing injury on the plaintiff.

It has often been asked how far a servant, the performance of whose duties becomes dangerous through the negligence of his employer properly to repair the premises, is justified in relying upon his employer's promise to amend the defect, when he himself has full knowledge of the dangerous conditions which exist, and of the risk which he runs by continuing in the service. The question was suggested again by a dictum of Morton, J., in the case of *Lewis v. N. Y. & N. E. R. R. Co.* (26 N. E. Rep. 431). The Massachusetts court gave no decision directly upon the point, however, for the plaintiff could not testify that he had urged the defendant's superintendent to make repairs because the discharge of his own duties had become more dangerous. Most, if not all, previous cases have gone upon the ground that the servant was led to continue at his employment by the master's promise that the defect complained of should be remedied. In some of them, there is a direct request to the servant, by the master or his representative, so to continue in service.

Another recent decision is that of *Rogers et al. v. Leyden* (26 N. E. Rep. 210), where the Indiana court held, after indorsing the propositions stated above, that the fact that the plaintiff remained in the defendant's employ after he had discovered that the risk thereof had been increased by the defendant's negligence, could not preclude recovery, where the defendant promised to remove the threatened danger.

Decisions which accord with that in the Indiana case have not been founded merely upon what was thought to be a rule of public policy, but upon contracts implied from the relationship of service, allowing the servant to rely upon the master's promise, unless the danger of continuing is so great that a reasonably prudent man would not assume it. And a similar explanation is undertaken by certain leading text-writers. It is said that a servant has the same right that any one else has to complete his contract in reliance upon its original terms. The

real question is held to be one of fact, whether or not the master had a right to believe that the servant intended to waive his objection to the defect in the materials provided for his work, and to accept an implied contract exempting the master from liability. (Sher. & Red., Neglig., sec. 215; Cooley. Torts, 2d ed. 559.)

It was well pointed out, however, by defendant's counsel in *Lewis v. N. Y. & N. E. R. R. Co.*, that the clear reason for the rule that the master owes the servant the inalienable duty of supplying suitable machinery is, that the servant may fairly expect that these matters of which he can know nothing, and of which the master, if he choose, can know everything, will be properly looked to by the master. It seems to follow reasonably that, whenever the servant's knowledge, or opportunity for obtaining knowledge, as to the dangers which will be incurred if he remains in service, is equal to his master's, the master owes him no duty to guard him against such dangers. The supposition is not that the employee, believing the employer has righted matters, goes on with his work without noticing the continuance of the defect. The servant knows as well as his master that the defect cannot be cured at once, and must appreciate the risk he will incur if he remains. To continue in the service is still a voluntary act, even if to leave it be a matter of hardship for the employee; and the principle of *volenti non fit injuria* may well apply.

## THE LAW SCHOOL.

### LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

THE STATUTE OF LIMITATIONS IN CASE OF FRAUD OR MISTAKE, AT LAW AND IN EQUITY. — *From Professor Ames's Lectures.* — FRAUD. — There is much diversity of opinion as to the rights of a plaintiff who has been defrauded of his money, and who has not discovered the fraud until after the period of limitation has elapsed. Inasmuch as the cause of action accrues in such cases when the fraud is consummated, and since the language of the Statute of Limitations is absolute, that no action on the case shall be brought unless within six years of the time when the cause of action accrued, it would seem to be a clear evasion of the statute to allow a recovery at law after the six years. Accordingly, in many jurisdictions recovery is not allowed in such cases.<sup>1</sup>

But in other jurisdictions the courts, influenced by the great hardship upon the plaintiff, have not scrupled to read into the statute an exception in favor of plaintiffs ignorant of the fraud.<sup>2</sup>

There is, however, a mode by which a plaintiff may secure full jus-

<sup>1</sup> *Gibbs v. Guild*, 9 Q. B. Div. 59 (*semble*); *Barber v. Houston*, L. R. 18 Irish, 475; *Campbell v. Vining*, 23 Ill. 525; *Ellis v. Kelo*, 18 B. Mon. 206; *Wilson v. Ivy*, 32 Miss. 233; *Troup v. Smith*, 20 Johns. 33; *Foot v. Farrington*, 41 N. Y. 164; *Miller v. Wood*, 116 N. Y. 351; *Smith v. Bishop*, 9 Vt. 110.

<sup>2</sup> *Bailey v. Glover*, 21 Wall. 342; *Homer v. Fish*, 1 Pick. 435; *Bowman v. Sanborn*, 18 N. H. 205; *Jones v. Conaway*, 4 Yeates, 109. It will be remembered that in Massachusetts, New Hampshire, and Pennsylvania there was formerly no chancery jurisdiction.

tice to himself without an evasion of the statute. He has only to seek the recovery of his money in equity instead of at law. It may be thought that equity has no jurisdiction where the only relief sought is the recovery of money got by fraud. But this is a misapprehension. Bills of this nature have been entertained from time immemorial. Indeed, at one time equity had exclusive jurisdiction of such cases. Now, a bill in equity, not being an action on the case, is not within the letter of the statute of James I. Equity, therefore, in giving effect to the statute follows its spirit, and refuses to apply it where its application would work injustice. The statute does not, therefore, begin to run against a defrauded plaintiff until he discovers, or ought, as a reasonable man, to have discovered, the fraud.<sup>1</sup>

**MISTAKE.** — The preceding observations apply to cases of money paid by mistake, if the receiver was aware of the mistake at the time of payment. If, however, the money was received innocently, the difficulty of working out the rights of the parties at law is increased. The cause of action must accrue either without, or else only after a demand. If no demand is necessary, the defendant may be unjustly condemned to pay the costs of an action although in no default and ignorant of any liability. If a demand must precede the cause of action, a plaintiff, by failing to make one, may postpone the running of the statute indefinitely. These difficulties are obviated in equity. For the plaintiff may proceed in equity without a demand, but if he acts oppressively, he must, although victorious in the suit, pay the costs. And, on the other hand, equity would refuse relief, if the plaintiff, knowing of his right, should allow the six years to go by.

It should be added that the common-law difficulties have been in great measure removed, in some jurisdictions, by special statutory provisions.

---

## RECENT CASES.

---

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the court. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

**AGENCY — CONTRACT BY UNAUTHORIZED AGENT.** — A person who contracts *bona fide*, as agent, without having in fact authority so to do, is personally responsible, on an implied warranty of his authority, to those who enter into agreement with him, believing that he is invested with such authority. *Farmers' Coop. Trust Co. v. Floyd et al.*, 26 N. E. Rep. 110 (Oh.).

**AGENCY — LIABILITY OF EMPLOYER FOR INJURY TO SERVANT — PROMISE TO REPAIR.** — The fact that the plaintiff remained in defendant's employ after he had discovered that the risk thereof had been increased by defendant's negligence, will not preclude his recovery, where defendant promised to remove the threatened danger. *Rogers et al. v. Leyden*, 26 N. E. Rep. 210 (Ind.).

**AGENCY — LIABILITY OF EMPLOYER FOR INJURY TO SERVANT — PROMISE TO REPAIR.** — Plaintiff was injured in the course of his duty as superintendent of defendants' drawbridge. A few days before this accident, he had called the proper officer's attention to it, saying that somebody was likely to be hurt, but not complaining on account of his own increased danger. *Held*, that he assumed all risks of the employ-

---

<sup>1</sup> *Booth v. Warrington*, 4 Bro. P. C. (Toml. Ed.) 163; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Blair v. Bromley*, 5 Hare, 542; *Kirby v. Lake Co.*, 120 U. S. 130; *Gibbs v. Guild*, 9 Q. B. Div. 59.

ment, and was not excused because of the promise made to him to repair. *Lewis v. N. Y. & N. E. R.R. Co.*, 26 N. E. Rep. 431 (Mass.).

**AGENCY — REVOCATION OF AUTHORITY — COMMISSION.** — Where a real-estate agent is employed to find a purchaser, and there is no limit as to time, the principal may at any time revoke the authority. But if at the time of revocation the agent had a negotiation pending for the sale, which the principal afterwards consummates, the agent is entitled to his commission. *Knox v. Parker*, 25 Pac. Rep. 909 (Wash.).

**BAILMENT — JUS TERTII — DEFENCE BY BAILEE.** — Defendants held goods as warehousemen of plaintiffs, to whom they gave delivery-orders to plaintiffs or order. Plaintiffs sold the goods to a third party, and endorsed the delivery-orders to him, but up to the time of trial the orders had not been presented to defendants. Plaintiffs gave defendants notice that they cancelled the endorsement of the delivery-orders, and demanded the goods, which the defendants retained on the ground that plaintiffs had no title to the goods, refusing the demand for *their own account*, and not on behalf of the true owner of the goods. *Held*, that a bailee of goods cannot avail himself of title of a third person to the goods as a defence to an action by the bailor, except by further showing that he is defending the action on behalf and by the authority of such person. *Rogers, Sons & Co. v. Lambert & Co.* [1891], 1 Q. B. 318, Ct. of App. (Eng.).

**BILLS AND NOTES — SEAL.** — An instrument in the form of a negotiable promissory note, but with a scroll in which the word "seal" was written, after the signature of the maker, is a sealed instrument, and not a negotiable promissory note, though there is no reference to a seal in the body of the instrument. *Osborne & Co. v. Hubbard*, 25 Pac. Rep. 1021 (Ore.).

**CONFLICT OF LAWS — GARNISHMENT** — Where the defendant is a resident of Illinois, and wages due him were earned there, the *situs* of the debt is Illinois; and though the plaintiff may have garnished the debtor while he was in Iowa, and the Iowa court thus have jurisdiction of the garnishment suit, yet by virtue of the principles of comity the Iowa court will apply the Illinois exemption laws to such wages. *Mason v. Beebe*, 44 Fed. Rep. 556 (Ia.).

**COPYRIGHT — DRAMATIZING A NOVEL.** — An action was brought by executors of A, to restrain the defendant from representing a certain drama in infringement of the plaintiff's stage copyright. A had first published a novel, and afterwards had published a dramatized version of his own novel. The defendant's drama was dramatized directly from the novel, after the publication of the dramatized version by A, but not with the help of his version. *Held*, that A having published the novel before the drama, any person had a right to dramatize the novel and represent the drama, and that therefore the action failed. *Schlesinger v. Bedford*, 68 L. T. N. S. 762 (Eng.).

A like action was also brought in the following case: A had first published a drama, and afterwards a novel founded on it. The defendant's drama was dramatized directly from the novel, and not with the help of A's drama. *Held*, that A having published the drama before the novel, no one had the right to infringe the stage copyright in the drama, even though the passages complained of were taken from the novel and not from the drama of the author. *Schlesinger v. Turner*, 63 L. T. N. S. 764 (Eng.).

**CORPORATIONS — NOT PERSONS — INTERPRETATION OF CONTRACT.** — A lease of land, with an iron furnace and a mill, and certain water-rights for purpose of working the same, contained a covenant on the part of lessees not to assign or underlet without consent in writing of the lessors, "such consent not to be unreasonably refused, or refused to a person of responsibility and respectability." The lessees agreed with the corporation of a borough to assign to them, and the corporation agreed with the lessees not to use the water-rights for manufacturing iron or steel. The lessors refused to consent to the assignment, on the ground that the corporation could not use the premises for the purposes for which they were intended. *Held*, that the corporation was not, under the terms of the lease, "a person of responsibility and respectability," within the meaning of the covenant therein, and that the consent had not been unreasonably withheld. *Harrison, Ainslie, & Co. v. Corporation of Barrow-in-Furness*, 39 W. R. 250 (Eng.).

**DAMAGES — PUNITIVE DAMAGES NOT ALLOWED.** — In Washington punitive damages cannot be recovered for personal injuries, however occasioned. *Spokane Truck & Dray Co. v. Hoefer*, 25 Pac. Rep. 1072 (Wash.).

**DAMAGES — REPLEVIN.** — In an action of replevin for a race-horse, all damages sustained by reason of the detention may be recovered. But fines incurred to certain racing associations for failure to race the horse during the period of detention, which the plaintiff was obliged to pay before he was permitted to race the horse again, cannot be recovered. *Riley v. Littlefield*, 47 N. W. Rep. 576 (Mich.).

**DAMAGES — TELEGRAPH COMPANIES — MENTAL SUFFERING.** — The receiver of a telegraphic message, the delivery of which has been negligently delayed by the telegraph company, cannot recover damages for mental suffering alone, unaccompanied with other injury. *Chase v. W. U. Tel. Co.*, 44 Fed. Rep. 554.

This case is opposed to the growing tendency of the courts to allow damages for mental suffering. There would seem to be no reason why, since the law protects mental security, damages for mental suffering should not be given. See *Wadsworth v. Tel. Co.*, 86 Tenn. 695, *contra*.

**EQUITY — COMBINATION IN RESTRAINT OF TRADE.** — The defendant sold his bakery business to the complainant corporation, and was employed by the corporation to continue the business as agent of the corporation. After operating under this arrangement for a time, the defendant repudiated the sale, resumed possession under the old firm-name, and refused to account to the complainant. The bill was brought for an injunction, an accounting, and for a receiver, pending the suit. The complainant was practically a "trust," organized to monopolize the business, and had secured control of thirty-five leading bakeries in twelve different States. *Held*, that while a case was made for a receiver, pending litigation, between ordinary parties, the prayer would be denied, as equity would not encourage a combination in restraint of trade, and probably illegal, under Act Cong. July 2, 1890. *American Biscuit Co. v. Klotz*, 44 Fed. Rep. 721.

**EQUITY — PAROL CONTRACT TO CONVEY LAND — ENFORCEMENT.** — Plaintiff, the mortgagee of land owned by defendant and another, orally agreed with defendant to relinquish his mortgage, and then together to acquire the interest of the other owner. Plaintiff performed his part by relinquishing his mortgage; but the defendant acquired title to the whole land, and conveyed. *Held*, that equity, though it cannot enforce the oral contract, will restore the *status quo ante* by reviving the mortgage as against defendant, and a purchaser from him with notice. *Mitchell v. Graham*, 8 So. Rep. 646 (Miss.).

**EVIDENCE — WITNESS — ASSIGNMENT OF A CHOSE IN ACTION.** — A married woman, having a claim for damages against the defendant company, assigned all her interest in the claim to a third party. *Held*, that in a suit brought by such third party against the defendant company in the name of the married woman, the husband would be a competent witness, although he was incompetent so long as his wife had an interest in the suit. *Railroad Co. v. Read*, 12 S. E. Rep. 395 (Va.).

**MORTGAGES — SUBROGATION.** — Though a mortgage of a wife's separate estate, given to secure the payment of a debt of her husband, is invalid in South Carolina, yet, where part of the money raised by such a mortgage is used to pay off a prior valid mortgage, the second mortgagee will be subrogated to the rights of the prior mortgagee, and may enforce his mortgage to that extent. *People's Nat. Bank v. Epstein et al.*, 44 Fed. Rep. 403.

**NEGLIGENCE — CONTRACTUAL RELATION — NO LIABILITY TO STRANGER.** — A builder contracted with a company for the construction of a building to be used as a hotel, and on completion it was turned over to, and accepted by, the company. But owing to negligent construction, there is a latent defect which results in injury to the plaintiff, who is a guest at the hotel. *Held*, that the contractor is not liable in tort to the plaintiff, since his only duty is to the company. *Curtain v. Somerset*, 21 Atl. Rep. 244 (Pa.).

**NEGLIGENCE — CONTRACTUAL RELATION — NO LIABILITY TO STRANGER.** — Where there is no contractual relation between a mortgagee of property and the valuer on whose valuation the mortgagee has relied, the valuer is not liable to the mortgagee in damages by reason of the valuation having been made without due skill and care. An action in such a case could not succeed except as an action for deceit, in which case it would be necessary to show fraud. *Scholes v. Brooks*, 63 L. T. N. S. 837 (Eng.).

**REAL PROPERTY — CONTRACT FOR PURCHASE.** — Where there is a contract for the absolute sale of land, though a note given for the first instalment of the

price recites that it is given in part payment for rent, yet upon default of payment at maturity, the contract of purchase is not terminated, and the relation of landlord and tenant is not substituted for it. *Quettermous v. Hatfield*, 14 S. W. Rep. 1096 (Ark.).

**REAL PROPERTY — EMINENT DOMAIN — CONDEMNATION OF LEASEHOLD.** — Where part of a tract of land subject to a lease is condemned for public use, the tenant's liability for rent is not affected thereby. *Stubbings v. Village of Evanston*, 26 N. E. Rep. 577 (Ill.).

**REAL PROPERTY — GRANTS UNKNOWN TO GRANTEES.** — A childless widower bought various pieces of land, and made mortgage loans with his own money, but had the deeds and notes run to his wife's relatives, whose agent he claimed to be, although they knew nothing of these transactions at the time. He kept the deeds unrecorded, and always paid taxes in the names of the grantees, expressing frequently his intention that the property should go to such grantees at his death. *Held*, in a suit brought by the heirs, that although the grantor had the rents during his life, the fact that the grantees after his death recorded said deeds, and claimed to own the land, was such ratification of the agency as to constitute the delivery to him effectual to pass the legal title to them. *Cook et al. v. Patrick et al.*, 26 N. E. Rep. 658 (Ill.).

**REAL PROPERTY — PERCOLATING WATER — NEGLIGENCE.** — A gas company, in sinking a well, penetrated two strata in which water was percolating. In the lower stratum the water was salt; in the upper, the water was fresh and fed the wells of the neighborhood. In consequence of the failure of the defendant's contractor to take suitable precautions, the water from the lower stratum rose and mingled with the water in the upper stratum, and spoiled the wells of the neighborhood. *Held*, that a well-owner could recover damages for the pollution of his well, and that the company was also liable for negligence in failing to take precautions necessary to prevent such an occurrence. *Collins v. Chartiers Valley Gas Co.*, 21 Atl. Rep. 147 (Pa.).

**TAXATION — NATIONAL BANKS — DIVIDENDS.** — Act Cong. June 30, 1864, § 120, required all banks to make a sworn return of the dividends declared and of the taxes due thereon. *Held*, such return is conclusive as to the liability of the bank. It cannot avoid paying the tax by showing that, owing to the undiscovered embezzlement by its cashier, there were no earnings for the year, and that the dividends were, in fact, paid out of the capital. *Central Nat. Bank v. United States*, 11 Sup. Ct. Rep. 126.

**TORTS — ARREST BY OFFICER WITHOUT A WARRANT.** — *Held*, that a breach of the peace was committed in the presence of an officer, when it was so near to him that he could hear what was said and the sound of blows, although it was too dark for him to see what was done. *State v. McAfee*, 12 S. E. Rep. 435 (N. C.).

**TORT — PROCURING BREACH OF CONTRACT.** — Plaintiffs made an agreement with W., whereby he sold, and agreed to deliver, to plaintiffs a certain crop of tobacco. Defendant, on account of ill-will which he bore to one of plaintiffs, maliciously, with intent to injure plaintiffs and to benefit himself, induced W. to break his contract with plaintiffs, and to sell the tobacco to defendant and his partner. *Held*, following the reasoning of Coleridge, J., in *Lumley v. Gye*, 2 El. & Bl. 216, that defendant was not liable, and that plaintiffs' only remedy was an action *ex contractu* against W. Also that an act lawful in itself cannot become actionable solely because it was done maliciously. *Chambers et al. v. Baldwin*, 15 S. W. Rep. 57 (Ky.).

**TORT — PROCURING BREACH OF CONTRACT.** — Appellants contracted with a certain actress, whereby she agreed to play at their theatre. Appellee maliciously, with intent to injure appellants, induced the actress to break her contract with appellants, and to play at his theatre. *Held*, following *Chambers v. Baldwin*, 15 S. W. Rep. 57, that appellee was not liable, and that, although there was a statute in Kentucky prohibiting the procuring of breaches of contracts by laborers, still that statute was not intended to include contracts for performances of dramatic artists. *Boulter et al. v. Macauley*, 15 S. W. Rep. 60 (Ky.).

This case and that of *Chambers v. Baldwin*, *supra*, show the unwillingness of the courts of one of the jurisdictions of this country to follow the rule laid down by the majority of the court in *Lumley v. Gye*, 2 El. & Bl. 216.



**TROVER — RETURN OF CHATTEL — DAMAGES.** — An action for the wrongful conversion of a certificate of stock cannot be continued, after the return of the certificate to the plaintiff and his acceptance thereof, to recover damages for his time, trouble, and expense in obtaining it, as the extinguishment of the conversion carries with it the damages resulting therefrom. *Collins v. Lowry*, 47 N. W. Rep. 612 (Wis.).

**TRUSTS — CONTRACT FOR SALE OF LAND — RIGHT OF VENDEE.** — The plaintiff contracted with the defendant for the sale of land. Before the deed was delivered to the plaintiff the land was taken by a railroad company under the right of eminent domain. *Held*, that the plaintiff must pay to the defendant the contract price of the land; and that he would be entitled to recover condemnation damages from the railroad company. *Gammon v. Blaisdell*, 25 Pac. Rep. 580 (Kan.).

**TRUSTS — CONVEYANCE TAKEN BY AGENT — STATUTE OF FRAUDS.** — *Held*, if a principal employs an agent by parol to purchase property, and the agent purchases in his own name, with his own money, and takes a conveyance to himself and denies the agency: to an action by the principal against the agent, seeking a conveyance to himself, section 7 of the Statute of Frauds still affords a good defence. *James v. Smith* [1891], 1 Ch. 384 (Eng.).

This decision is opposed to the doctrine generally accepted in America, that this is a constructive trust, and the statute has no application. See *Rose v. Hayden*, 36 Kan. 106; but see *Burden v. Sheridan*, 36 Ia. 125, *contra*.

It is also opposed to what has been thought to be the law in England; the case of *Bartlett v. Pickersgill*, 4 East, 577, which it follows, having been treated as overruled.

**TRUSTS — VOLUNTARY SETTLEMENT.** — By a voluntary deed of settlement containing full powers of attorney to collect and sue, P. assigned to M. four specialty debts secured by bills of sale. There was no express assignment of the bills of sale, or of the goods comprised therein. Before his death P. received payment of these debts. *Held*, M. could prove against P.'s estate for the amount of these debts. *In re Patrick* [1891], 1 Ch. 82, Ct. of App. (Eng.).

## REVIEWS.

**A TREATISE ON THE LAW OF JUDGMENTS, INCLUDING THE DOCTRINE OF RES JUDICATA.** By Henry Campbell Black. In two volumes. St. Paul, Minn.: West Publishing Co., 1891. 8vo. pp. xcii and 1270.

This book is the latest, largest, and — we feel safe in saying — is destined to become the most satisfactory to the profession, of all the present treatises on this general subject. The work gives evidence throughout of accurate and exhaustive research. It is, first and foremost, a practical book of reference, with a copious and well-ordered index. The chief object is to state the law as it is, and not as it has been or should be. The growth of a particular doctrine is traced only when necessary to explain a present conflict of authority — as in the discussion of the Conclusiveness of Foreign Judgments. Where the law in the different States is in square conflict, the author's conclusions are stated boldly, and well supported, but not at excessive length, an admirable sense of proportion being shown in all parts of the book.

Especially commendable is the treatment of the difficult subject of Estoppel by Record, in which, as the preface states, "the apparent confusion arises, not so much from any real contradiction or obscurity in the authorities, as from the infinite variety exhibited in the facts of the different

cases, and the necessity of making nice discriminations in the principles to be applied." That Mr. Black has so used his unusual faculty of minute examination and methodical arrangement as to free this branch of his subject from much of the vagueness which before encompassed it, an examination of the chapter dealing with this troublesome topic will amply prove. We commend this work to the profession as an exhaustive and entirely reliable book of reference. W. B.

---

## LEADING ARTICLES IN EXCHANGES.

---

### **The Green Bag.** Vol. 3. Boston Book Co.

No. 3. Sir John Thompson (with portrait). The Inner Witness. Curious Circuit Customs. The Supreme Court of Louisiana (L. C. Quintero). Judicial Life (Irving Browne). The English Bench and Bar of To-day, Lord Coleridge (with portrait). A Visit to an English Police Court. Causes Célèbres XXIII. No. 29 Ratcliffe Highway. Mutable Law and Immutable Justice.

### **American Law Register.** Vol. 30. D. B. Canfield Co., Phila.

No. 2. Racial Discrimination (D. H. Pingrey). Measure of Damages — *Beeman v. Banta*, *Stensgard v. Smith* — Mutuality in Contract.

### **Central Law Journal.** Vol. 32. St. Louis, Mo.

No. 10. What do we mean by the Term "Fixture"? (W. D. Coles.)  
No. 11. Power of Municipal Corporation to take Property for Local Improvements (D. H. Pingrey).

No. 12. Bills of Exceptions (W. E. Bainbridge).

### **Current Comment.** Vol. 3. D. B. Canfield Co., Phila.

No. 2. Hon. John Blair. Lectures on Constitutional Law. Harvey Birch, the Spy.

### **Chicago Law Journal.** Vol. 2. N. S.

No. 2. Assignments for Benefit of Creditors. Fraud of Assignor which vitiates Assignment.

### **Law Journal.** Vol. 26.

No. 1310. Debentures, Liability of Solicitors in investing Trust Funds.  
No. 1311. The Electoral Disabilities: Removal Bill. Extension of Relief against Forfeiture.

No. 1312. "Law Journal Reports" for March. Financing an Exhibition. II. Progress of Legislation.

### **Irish Law Times and Solicitor's Journal.** Vol. 25. Dublin.

No. 1257. The New Rules of Practice: Writs of Summons.

No. 1258.

No. 1259. Strikes preventing Performance of Contracts.

### **The Canada Law Journal.** Vol. 27.

J. E. Bryant & Co., Toronto.

No. 4. Priorities under Registry Act.

### **Criminal Law Magazine.** Vol. 13. F. D. Linn & Co., Jersey City, N. J.

No. 2. Homicide committed in making an Arrest (W. W. Thornton). The Second Session of the International Criminal Law Association (Emily Kempin, Doctor of Laws).

### **Columbia Law Times.** Vol. 4.

No. 5. Citizenship and Franchise (M. A. Lesser).

# HARVARD LAW REVIEW.

---

VOL. V.

MAY 15, 1891.

No. 2.

---

## THE OLDER MODES OF TRIAL.

---

WHEN the Normans came into England they brought with them, not only a far more vigorous and searching kingly power than had been known there, but also a certain product of the exercise of this power by the Frankish kings and the Norman dukes; namely, the use of the inquisition in public administration, *i.e.*, the practice of ascertaining facts by summoning together by public authority a number of people most likely, as being neighbors, to know and tell the truth, and calling for their answer under oath. This was the parent of the modern jury. In so far as the business of judicature was then carried on under royal authority it was simply so much public administration, and the use of the inquisition came to England as an established, although undeveloped, part of the machinery for doing all sorts of public business. With the Normans came also another novelty, the judicial duel — one of the chief methods for determining controversies in the royal courts; and it was largely the cost, danger, and unpopularity of the last of these institutions which fed the wonderful growth of the other.

The Normans brought to England much else, and found that much of what they brought was there already; for the Anglo-Saxons were their cousins of the Germanic race, and had, in a great degree, the same legal conceptions and methods, only less worked out. Looking now at these and at the Norman additions, what were the English modes of trying questions of fact when the jury came in, and how did they develop and die out? Some

slight account of these things will serve as a background in trying to make out the jury.

I. The great fundamental thing, to be noticed first of all, out of which all else grew, was the conception of popular courts and popular justice. We must read this into all the accounts of our earliest law. In these courts it was not the presiding officers, one or more, who were the judges: it was the whole company — as if in a New England town-meeting, the lineal descendant of these old Germanic moots, the people conducted the judicature, as well as the finance and politics, of the town. These old courts were a sort of "town-meeting" of judges. Among the Germanic races this had always been so; nothing among them was more ancient than this idea and practice of popular justice.<sup>1</sup> This notion among a rude people carried with it all else that we find,—the preservation of very old traditional methods, as if sacred; a rigid adherence to forms; the absence of the development of the rational modes of proof. Of the popular courts Maine says, in the admirable sixth chapter of his "Early Law and Custom," while speaking of the Hundred Court and the Salic Law: "I will say no more of its general characteristics than that it is intensely technical, and that it supplies in itself sufficient proof that legal technicality is a disease, not of the old age, but of the infancy of societies." The body of the judicial business of the popular courts seven and eight centuries ago lay in administering rules that a party should follow this established formula or that, and according as he bore the test should be punished or go quit. The conception of the trial was that of a proceeding between the parties, carried on publicly under forms which the community oversaw. They listened to complaints which often must follow with the minutest detail certain forms "de verbo in verbum," which must be made probable by a "fore-oath," complaint-witnesses, the exhibition of the wound, or other visible confirmation. There were many modes of trial and some range of choice for the parties; but the proof was largely "one-sided," so that the main question was who had the right to go to the proof, for this was often a privilege. For determining this question there were traditional usages and rules, and the determination was that famous *Beweisurtheil* which disposed of

---

<sup>1</sup> Maine, *Early Law and Custom*, c. 6; *Pop. Gov.*, pp. 89-92; *Essays in Anglo-Saxon Law*, 2-3.

cases before they were tried. Since the trial was a matter of form, and the judgment was a determination what form it should take, the judgment naturally came before the trial. It determined, not only what the trial should be, but how it should be conducted and when, and what the consequence should be of this or that result.

In these trials there are various conceptions: the notion of a magical test, like the effect of the angel's spear upon the toad in Milton's lines —

" Him thus intent Ithuriel with his spear  
Touched lightly; for no falsehood can endure  
Touch of celestial temper, but returns  
Of force to its own likeness; up he starts,  
Discovered and surprised; "

that of an appeal for the direct intervention of the divine justice (*judicium Dei*, Gottesurtheil); that of the application of a mere form, sometimes having a real and close relation to the probable truth of fact, and sometimes little or no relation to it, like a child's rignarole in a game; that of regulating the natural appeal of mankind to a fight; that of simply abiding the appeal to chance. There was also, conspicuously and necessarily, the appeal to human testimony, given under an oath, and, perhaps, under the responsibility of fighting in support of it. But what we do not yet find, or find only in its faint germs, is any trial by a court which weighs this testimony or other evidence merely in the scale of reason, and decides a litigated question as it is decided now. That thing, so obvious and so necessary, as we are apt to think it, was only worked out after centuries.<sup>1</sup>

The old forms of trial (omitting documents) were chiefly these: (1) By witnesses; (2) The party's oath, with or without fellow-swearers; (3) The ordeal; (4) Battle. Of these I will speak in turn; they were companions at first of trial by jury when that mighty plant first struck its root into English soil, and some of them lived long beside it. As we shall see, while that grew and spread, all of them dwindled and died out.

II. But first something must be said of that institution of the complaint-witnesses, called also (as some other things were called) the "Secta," which has been the source of much confusion. This had a function which was a natural and almost necessary

---

<sup>1</sup> The reasons which still make it so difficult to refer international controversies to the rational mode of trial may help us to understand our older law.

feature of the formal system of proof. When the proof was "one-sided," and allotted to this man or that as having merely the duty of going through a prescribed form to gain his case, it was a very vital matter to determine which of the parties was to have it. If there was to be a trial it was a privilege, in a civil case, to go to the proof; and yet the form was often clogged with technical detail, and had little or no rational relation to the actual truth of fact involved in the charge, it might be very dangerous and burdensome to be put to the necessity of going through with it. The forms of trial might also involve bodily danger or death. Not every complaint or affirmative defence, therefore, would put an antagonist to his proof: there must be something to make it probable. This notion is fixed in the text of John's Magna Carta (art. 38) in 1215: *Nullus ballivus ponat de cetero aliquem ad legem*<sup>1</sup> *simplici loquela sua, sine testibus fidelibus ad hoc inductis.*<sup>2</sup>

This sort of "witness," it must be noticed, might have nothing to do with the trial; he belonged to the stage of the preliminary allegations, the pleading, where belonged profert of the deed upon which an action or a plea was grounded. But just as rules belonging to the doctrine of profert in modern times crept over, unobserved, into the region of proof, under the head of rules about the "best evidence" and "parol evidence," so the complaint-witnesses were, early and often, confused with proof-witnesses — a process which was made easy by the ambiguity of the words "testis," "secta," and "witness." The complaint-proof was thus confused with the old "one-sided" witness-proof, with the rational use of witnesses by the ecclesiastical courts, and with the proof by oath and oath-helper. One complaint-witness seems originally to have been enough, and in the procedure leading to the duel or the

<sup>1</sup> As to this term *lex*, see 4 Harv. Law Rev. 157-8.

<sup>2</sup> Brunner's explanation of this passage is found in his *Schwurg.*, 199-200. "If a lord appears with a complaint-witness against his vassal, in his own court, the vassal must answer, although no witnesses are brought. . . . Sometimes this privilege was limited so that the lord had it but once a year. The privilege of the fisc [or, as we should say, the crown] in this respect was unlimited. If a royal officer appears as plaintiff in a complaint belonging to his chief, he need not produce any witness. . . . Even if such a complaint only called for the oath of purgation from the defendant, yet for this there was need, not merely of a clear conscience, but compurgators, and the painful formalism of the oath might only too easily bring the swearer to grief. Article 38 in Magna Carta may have owed its origin to such considerations when it provided, 'Nullus ballivus,' etc. See also Brunner in *Zeitschrift der Savigny-Stiftung* (Germ. Abt.), ii. 214.

grand assize one was always enough, but generally two or more were required; and as in the duel the witness might be challenged, so in other trials the defendant could stake his case on an examination of the complaint-witnesses, and if they disagreed among themselves he won. Apart from this, the complaint-witnesses need not be sworn; they might be relatives or dependents of the party for whom they appeared. As they were not necessarily examined at all, so in later times they were not even produced, and only the formula in the pleadings was kept up. In this form, as a mere expression in pleading, *et inde producit sectam*, the *Secta* (Suit) continued to live a very long life; so that within our own century we read as the third among Stephen's "principal rules of pleading," that "the declaration should, in conclusion, lay damages and allege production of suit. . . . This applies to actions of all classes. . . . Though the actual production has for many centuries fallen into disuse, the formula still remains, . . . 'and therefore he brings his suit,' " etc.<sup>1</sup> This formula even survived the Hilary rules of 1834.

It was the office of the *secta* to support the plaintiff's case, in advance of any answer from the defendant. This support might be such as to preclude any denial, as where one was taken "with the mainour" and the mainour produced in court,<sup>2</sup> or where the defendant's own tally or document was produced, or, as we have noticed, where a defendant chose to stake his case on the answers of the *secta*. Documents, tallies, the production of the mainour, the showing of the wound in mayhem, all belong under

<sup>1</sup> Pleading (Tyler's ed., from the 2d Lond. ed. of 1827), 370-2.

<sup>2</sup> Palgrave has a lively thirteenth century illustration of this in his fiction founded on fact, "The Merchant and the Friar," 173; see also *Palg. Eng. Com.*, ii. p. clxxxvii, pl. 21 (1221); s. c. Maitland, *Pl. Crown for Gloucester*, 92, pl. 394; *ib.* 45, pl. 174, and notes pp. 145, 150; Pike's *Hist. Crime*, i. 52. It is an entire misapprehension to suppose, as Stephen does, *Hist. Cr. Law*, i. 259, that this is a trial. The point of the matter is that trial is refused. This principle also covered cases that were not so plain; as in 1222 (*Br. N. B'k*, ii., case 194), in an action for detaining the plaintiff's horse which he had sent by his man to Stamford market for sale, it is charged that the defendant had thrown the man from the horse in the market, imprisoned him five days, kept the horse so that afterwards he was seen in the Earl of Warenne's harrow at Stamford, etc., *et inde producit sectam* (giving ten or eleven names). The defendant defends the taking and imprisonment and all, word for word, etc. "But because all the aforesaid witnesses testify that they saw the horse in the seisin of Richard and in the harrow of the Earl, and this was done at Stamford market," the defendant had his day for judgment. The author of the note-book has a memorandum on the margin at this case: *Nota quod ea qua manifesta sunt non indigent probatione*.

this general conception. The history of our law from the beginning of it is strewn with cases of the profert of documents. This last relic of the principle of the Saxon fore-oath and the Norman complaint-witness was not abolished in England until 1852.<sup>1</sup>

A few cases will illustrate what has been said about the secta. In 1202, in the King's Court, an appeal was brought for assaulting the plaintiff and wounding him with a knife in the jaw and arm, "and these wounds he showed, and this he offers to prove . . . by his body."<sup>2</sup> In 1226<sup>3</sup> William seeks to recover of Warinus twelve marks on account of a debt due from his father for cloth, *et inde producit sectam que hoc testatur*. Warinus comes and defends, and asks that William's secta be examined. This is done, and the secta confess that they know nothing of it, and moreover they do not agree (*diversi sunt in omnibus rebus*); and William has no tally or charter and exhibits nothing, and it is adjudged therefore that the defendant go quit. In 1229<sup>4</sup> Ada demands of Otho eleven pounds, which her father had lent him, and makes profert of a tally, and produces a secta which testifies that he owes the money. Otho denies it, and is adjudged to make his proof with eleven compurgators — *defendat se duodecima manu*. A case in 1323 draws attention to the exact effect of the complaint-proof.<sup>5</sup> A woman claimed dower, alleging that her husband had endowed her *assensu patris*, and put forward a deed which showed the assent. The defendant traversed; some discussion followed as to how the issue was to be tried, and as to the effect of the deed. Counsel for the defendant said, "The deed which you show effects nothing beyond entitling you to an answer." . . . Counsel for the plaintiff: "True, but . . . he can only have such issue as the deed requires."

With the gradual discrediting of party proof and the formal procedure, the secta steadily faded out. As early as 1314<sup>6</sup> we find counsel saying that the Court of Common Bench will not allow the secta to be examined. Ten years later,<sup>7</sup> a demand for

<sup>1</sup> St. 15 & 16 Vic., c. 76, s. 55.

<sup>2</sup> Selden, Soc. Pub. i., case 87. This was good old Germanic usage. Brunner, Schw. 201. Compare LL. H. I. xciv., § 5 (Thorpe, i. 608).

<sup>3</sup> Bracton's Note Book, iii., case 1693.

<sup>4</sup> Bracton's Note Book, ii., case 325.

<sup>5</sup> Y. B. Ed. II. 507.

<sup>6</sup> Y. B. Ed. II. 242.

<sup>7</sup> Ib. 582.



examining the *secta* reveals the fact that the plaintiff has none; and this defeats his claim. Finally, in 1343,<sup>1</sup> in an action of debt for money due, partly under a bond and partly by "contract," we read: "*Rich.* As to the obligation, we cannot deny it; as to the rest, what have you to show for the debt? *Moubray.* Good suit (*secta*). *Rich.* Let the suit be examined at our peril. *Moubray.* Is that your answer? *Rich.* Yes, for you furnish suit in this case of contract in lieu of proof of the action. *Moubray.* Suit is only tendered as matter of form in the count; wherefore we demand judgment. *Sh. (J.).*<sup>2</sup> It has been heard of that suit was examined in such cases, and this opinion was afterwards disproved (reprove). *Sh. (J.).*<sup>2</sup> Yes, the same Justice who examined the suit on the issue [*pur issue*] saw that he erred and condemned his own opinion. *Gayneford.* In a plea of land the tendering of suit is only for form, but in a plea which is founded on contract that requires testimony, the suit is so examinable [*tesmoinable*] that, without suit, if the matter be challenged, the [other] party is not required to answer. *Sh. (J.).*<sup>2</sup> Certainly it is not so; and therefore deliver yourselves. *Rich.* No money due him," etc.<sup>3</sup> The thing is evidently antiquated by this time. And yet, as we saw, it continued as a form in pleading for nearly five centuries longer.

III. *Trial by Witnesses.* — This appears to have been one of the oldest kinds of "one-sided" proof. There was no testing by cross-examination; the operative thing was the oath, and not the probative quality of what was said, or its persuasion on a judge's mind.<sup>4</sup> Certain transactions, like sales, had to take place before previously appointed witnesses. Those who were present at the church door when a woman was endowed, or at the execution of a charter, were produced as witnesses. It was their state-

<sup>1</sup> Y. B. 17 Ed. III. 48, 14.

<sup>2</sup> Whether Shardelowe or Sharesull, both judges of the Common Bench, at this time, I do not know.

<sup>3</sup> Selden, as one would think, misconceived this matter when he said (Note 8, *Forrescue de Laud.*, c. xxi), after citing a case of trial by witnesses, in 1234, printed for the first time in Maitland's invaluable "*Bracton's Note Book*" four years ago: "The proofs of both sides are called *secta*. It was either this or some like case that Shard[elowe] entended in 17 Ed. III., fol. 48 b, in John Warrein's case — speaking of a justice that examined the suit. And it appears [he adds truly] there, that under Ed. III., the tendering of suit or proofs was become only formal as at this day, like the *plegii de proseguendo*."

<sup>4</sup> Brunner, *Schw.* 54-59.

ment, sworn with all due form before the body of freemen who constituted the popular court, that ended the question. In order to show the purely formal character of this sort of proof in the period of the Frankish kings, even where counter-witnesses were allowed, Brunner refers to a capitulary of Louis le Débonnaire, of the year 819. It is added in a note. It will be observed that while he who suspects that witnesses produced against him are false may bring forward counter-witnesses, yet if the two sets differ hopelessly, the only solution of the difficulty that offers is to have witnesses from each side fight it out together.<sup>1</sup>

An English illustration of the old trial by witnesses of the date of 1220-1, and bearing marks of antiquity then, is found in the *Liber Albus*,<sup>2</sup> where, before Hubert de Burgh and his associate justices, the citizens of London answer as to the way in which certain rents may be recovered in London, viz., by writ of "Gaverlet," in which, if the tenants deny the *servitium*, the claimant shall name *sectam suam, scilicet duos testes*, who are to be enrolled and produced at the next hustings. "And if on this day he produce the witnesses and it is shown by them *ut de visu suo et auditu*, . . . the complainant shall recover his land in demesne." This is also incorporated in the "Statute of 'Gaverlet,'" of 10 Edward II. (1316).

But even earlier than this, here, as also in Normandy,<sup>3</sup> the old mere party proof by witnesses had, in the main, gone by. Things indicate the breaking up and confusing of older forms; anomalies and mixed methods present themselves. The separate notions of the complaint *secta*, the fellow swearers, the business witnesses, the community witnesses, and the jurors of the inquisition and the assize run together. It is very interesting to find that, as the

---

<sup>1</sup> Si quis cum altero de qualibet causa contentionem habuerit, et testes contra eum per iudicium producti fuerint, si ille falsos eos esse suspicatur, liceat ei alios testes, quos meliores potuerit, contra eos opponere, ut veracium testimonio falsorum testium perversitas superetur. Quod si ambæ partes testium ita inter se dissenserint, ut nulla tenus una pars alteri cedere velit, eligantur duo ex ipsis, id est, ex utraque parte unus, qui cum scutis et fustibus in campo decertent utra pars falsitatem, utra veritatem suo testimonio sequatur. Et campioni qui victus fuerit, propter perjurium quod ante pugnam commisit, dextera manus amputetur. Cæteri vero ejusdem partis testes, quia falsi apparuerint, manus suas redimant; cujus compositionis duæ partes ei contra quem testati sunt dentur, tertia pro fredo solvatur. — (Capitulare Primum Ludovici Pii, A. D. 819. — *Baluse*, Capitularia Regum Francorum, I. 601.)

<sup>2</sup> Mun. Gild. Lond. i. 62.

<sup>3</sup> Brunner, Schw. 189.

Norman law contemporaneous with our earliest judicial records shows the same breaking up and confusion as regards this sort of trial which we remark in England, so it is the same classes of cases in both countries that preserve the plainest traces of it. "In my opinion," says Brunner,<sup>1</sup> "undoubtedly we are to include under the head of the formal witness-proof these: (1) The proof of age; (2) The proof of death; . . . (3) The proof of property in a movable chattel."

(a.) *Age*. — In a case of 1219, in the Common Bench,<sup>2</sup> where the defendant alleged the minority of the plaintiff, the plaintiff replied that he was of full age, and thereof he put himself on the inspection of the judges, and if they should doubt about it he would prove it either by his mother and his relatives, or otherwise, as the court should adjudge. The judges were in doubt, and ordered that he prove his age by twelve legal men, and that he come with his proof "on the morrow of souls."<sup>3</sup> Now these twelve are not at all a "jury," for the party selects them himself. At the page of Bracton's treatise where he cites this case, he tells us that in these cases the proof "is by twelve legal men, or more if there be need, some of whom are of the family . . . and some of whom are not;" and he gives the form of oath, which is a very different one from that of the jury. First, one of them swears that the party is or is not twenty-one if a man, or fourteen or fifteen if a woman.—*sic me Deus adjuvet et sancta Dei evangelia*; and then in turn each of the others swears that the oath thus taken is true.

In a peculiarly interesting part of his great work on the jury, Brunner points out that the old witness-proof was in some cases transformed at the hands of the royal power into an inquisition, so that the witnesses were selected by the public authority, as they were in the ordinary jury. We seem to see this way of blending things in the English process, *de ætate probanda*. In 1397<sup>4</sup> we read, after the statement that the king's tenants, on coming of age, in order to recover their lands must sue out a writ of *ætate probanda*, that those who serve on the inquest must be at least forty-two years old, "and shall tell signs to prove

<sup>1</sup> Schw. 205.

<sup>2</sup> Bracton's Note Book, ii., case 46; cited in Bracton, f. 424 b.

<sup>3</sup> See also ib. iii., case 1131 (A. D. 1234), and case 1362 (in 1220).

<sup>4</sup> Bellewe, 237.

the time of the birth, as that the same year there was a great thunder, tempest, or pestilence, and the like; and all these signs shall be returned by the sheriff." And the reporter puts it as a query whether, since this is proof by witnesses (*per proves*), there may be less than twelve. The requiring of the age of forty-two points to the idea that they must have been of an age to be a witness when the child was born. By 1515<sup>1</sup> this doubt seems to have been settled: "It was agreed that the trial of his age shall be by twelve jurors; but in giving their verdict every juror should show the reason inducing his knowledge of the age, such as being *son gossipe*, or that he had a son or daughter of the same age, or by reason of an earthquake or a battle near the time of the birth, and the like." Quaint illustrations of these examinations, of the year 1409, are found in the *Liber de Antiquis Legibus*.<sup>2</sup> In one of these cases, relating to a woman's age, each of the twelve makes his statement separately, and each is asked how he knows it. One, sixty years old, says that he fixes the age by the fact that he saw the child baptized; they had a new font, and she was the first person baptized from it. Another, a tailor of the same age, says that he held a candle in the church on the day of baptism, and also made the clothes which the mother wore at her purification. Two others, over fifty, fix the day by a great rain and flood which made the river overflow, and filled the hay with sand. Two others recollect that their hay from six acres of meadow was carried away by the flood. Two others remember it by a fire that burned a neighbor's house. Another by the fact that he was the steward of the child's grandfather, and was ordered by him to give the nurse who told him the news twenty shillings; and so on. It is easy, then, to see how in this sort of case the old proof by witnesses should gradually fade out into trial by jury; for the old jury was nothing but a set of triers made up of community witnesses selected by the king's authority. The old mode of trying age by the inspection of the judges, which we saw in 1219, was practised long; but the general rule became established in all such cases that the judges, if in doubt, might refer the matter to a jury.<sup>3</sup>

(b.) *Ownership of Chattels*.—There were other sorts of trans-

---

<sup>1</sup> Keilwey, 176-7.

<sup>2</sup> pp. cxlix-cliii, Camden Soc. Pub., London (1846).

<sup>3</sup> Brooke's Ab. Trial. 60.

formation. We have seen<sup>1</sup> how the old law could admit counter-witnesses without destroying the formal nature of the proof. With the refinement of procedure, affirmative defences came to be more distinctly recognized; each party had to produce a complaint secta. There grew up the practice (whether by consent of parties or otherwise) of examining these, and disposing of the case according as one secta was larger or more numerous than the other, or composed of more worthy persons; and, again, if it was impossible to settle it on such grounds, of going to the jury. The secta in such cases turned into proof-witnesses. It was such a class of cases that brought down into our own century the *name* of "trial by witnesses," and the fact of a common-law mode of trial which had not sunk into the general gulf of trial by jury.

In 1234-5<sup>2</sup> there came up to the king's court a record of proceedings in the hundred court of a manor of the Bishop of Salisbury. A mare had been picked up in the manor, and one William claimed her in the hundred court and took her, on producing a sufficient secta and giving pledges to produce the mare and abide the court's order for a year and a day, according to the custom of the manor. One Wakelin de Stoke then appeared as claimant, and the steward required each to come on a day with his secta. They came *et Wakelinus producit sectam quod sua est et similiter Wilhelmus venit cum secta sua dicens quod sua fuit et ei pullanata* (i.e., foaled). The hundred court, finding itself puzzled and not knowing *cui incumberebat probacio*, postponed judgment *pro afforciamiento habendo* (i.e., *semble*, in order that the parties might increase their sectas). Then Wakelin appeared with a writ removing the case to the king's court at Westminster. At Westminster William produced his secta, and they differed *in multis, et in tempore et in aliis circumstanciis*, some of them saying that William bought the mother of the mare four years ago, and she was then pregnant with her and had a small white star on her forehead; and some that it was six years ago and she had n't any star; and some agreeing in the time but differing about the mark, — some of them saying she had no star, but only some white hairs on her forehead, and some that she had n't any star at all. Wakelin produced a secta that wholly agreed, all saying that on such a day, four years back, Wakelin came and bought a sorrel (*sorram*) mare with a

---

<sup>1</sup> *Ante*, p. 52.

<sup>2</sup> Bracton's Note Book, iii., case 1115.

sucking colt, and gave the colt to one John to keep. They were questioned about marks, and entirely agreed in saying that the colt had the left ear slit and the tail partly cut off, and that she was black. A view was taken of the colt, and she was not more than four years old at most, or three years and a half at least. Then an official of the manor, Thomas de Perham, said that Wakelin, before he saw the mare in question, told her color and all the marks by which she could be identified, and that William, when he was questioned, did not know her age, and said nothing distinct, except that she was foaled to him. The case, however, went down again for judgment, because the Bishop of Salisbury claimed his jurisdiction; *et quia secta quam Wilhelmus producit non est sufficiens nec aliquid probat et quia loquela incepta fuit infra libertatem episcopi . . . concessa est ei et teneat unicuique justiciam*.<sup>1</sup>

(c.) *Death*. — But the typical sort of case, and the longest-lived, is what Selden instances in the note just cited when he says: "But some trials by our law have also witnesses without a jury; as of the life and death of the husband in dower and in *cui in vita*. This continued in England until the end of the year 1834. A case or two will illustrate this proceeding.

In 1308<sup>2</sup> Alice brought a *cui in vita*, and Thibaud, the tenant, answered that the husband was living. The woman offered proof that he was dead (hanged at Stamford); the tenant the same that he was alive, *issint que celui que mend prouvereit mend avereit*. "Alice came and proved her husband's death by four *jurets*, who agreed in everything; and because Thibaud's proof was *mellour et greyneure* than the woman's proof, it was adjudged that she take nothing by her writ." In Fitzherbert (Trial 46), what seems to be the same case is briefly referred to, and there we read that they were at issue *issint cesti que mieulx prove mieulx av.*; and the tenant proves by sixteen men, etc., and the demandant by twelve; and because the tenant's proof "*fuit greindr* than the demandant's, it was awarded," etc. If we take Fitzherbert's account to be accurate, it might appear that the twelve men on each side cancelled each other, and left a total of four to the credit of the tenant, a

<sup>1</sup> For the theory of such cases see Brunner, Schw. 431. Selden (note 8 to Fortescue de Laud., c. 21) says: "It was either this or some like case that Shard intended in 17 Ed. 3, 48 b, in John Warrein's case, speaking of a justice that examined the suit." This may well be doubted.

<sup>2</sup> Y. B. Ed. II. 24.

result which left his proof the better.<sup>1</sup> This old catch of *qui mieulx prove mieulx av.*, a pretty certain badge of antiquity, appears again sixty years later. A woman brought an appeal for her husband's death. The defendant said he was alive. The parties were directed to bring their witnesses, *et celui qui meuch prova meuch av.*<sup>2</sup> In 1560, in the interesting case of *Thorne v. Rolff*,<sup>3</sup> we have an instance where, in dower, issue was taken on the death or life, and the parties were called on to inform the court "*per proves, [i.e., witnesses] ut oportet.*" The demandant brought two, "who were sworn and examined by Leonarde, second prothonotary." These statements are entered in full on the record, which is all given in Benloe's report. The two statements occupy about a page of the folio. Then it is recorded that the tenant produced no witnesses, and the court admits what is offered, as *bonam, probabilem et veram probationem*, and gives judgment for the demandant. Dyer connects this with the old law by citing Bracton, 302, where he speaks of deciding in such cases according to the *probatio magis valida*. The number, rank, and position of the witnesses are what Bracton alludes to. But it is probable that by the time of *Thorne v. Rolff* the rational method of conducting the "trial by witnesses" had taken place; for Coke, half a century later,<sup>4</sup> in enumerating "divers manners of trials," designates this as "trial *by the justices* upon proofs made before them;" and so Comyns, a hundred years afterwards.<sup>5</sup> Blackstone, however, later in the last century,<sup>6</sup> and Stephen,<sup>7</sup> pour back again this new wine into the old bottles and call this wholly modern thing by the old name of "trial by witnesses." Blackstone's explanation of it shows little knowledge of its history. And at last this venerable and transformed relic of the Middle Ages was abolished in England, when real actions came to an end by the statute of 1833.

IV. *Trial by Oath*. — As the Anglo-Saxons required from a

---

<sup>1</sup> Dyer, 185 a, pl. 65, quotes this case as showing four witnesses for the woman and twelve for the tenant.

<sup>2</sup> Lib. Ass. 273, 26; Brooke, Ab., Trial, 90, makes the phrase read *cesty qui nient provera nient avera*.

<sup>3</sup> Dyer, 185 a, ed. 1601; s. c. Old Benloe, 86.

<sup>4</sup> Case of the Abbot of Strata Mercella, 9 Co. 30 b.

<sup>5</sup> Digest, Trial (B).

<sup>6</sup> Com. iii., c. 22.

<sup>7</sup> Pleading, Tyler's ed. (from the 2d Eng. ed., 1827), 114, 131.

plaintiff the taking of a fore-oath, so the defendant was allowed sometimes to clear himself merely by his own oath. But the great mediæval form of trial by oath was where the party swore with the auxiliary oath of others—compurgation. In the Salic law, that “manual of law and legal procedure for the use of the free judges in the oldest and most nearly universal of the organized Teutonic courts, the court of the hundred,”<sup>1</sup> in the fifth century, we find it.<sup>2</sup> It continued among the Germanic people in full force. These fellow-swearers were not witnesses; they swore merely to the truthfulness of another person's oath, or, as it was refined afterwards, to their belief of its truth. It was not requisite that they should have their own knowledge of the facts. Although constantly called by the ambiguous name *testis*, they were not witnesses. They might be, and perhaps originally should be, the kinsmen of the party.<sup>3</sup>

In our own early books this was a great and famous “trial,” and its long survival has made it much more familiar to the modern English student than some of its mediæval companions. It was the chief trial in the popular courts, and as regards personal actions, in the king's courts, where, in real actions also, it was resorted to in incidental questions.<sup>4</sup> In the towns it was a great favorite. An early and quaint illustration of it is found in the Custumal of Ipswich, drawn up about the year 1201 by way of preserving the old usages of the town, and again compiled a hundred years later because of the loss of the older copy.<sup>5</sup> In debt between citizens of the town, the party who had to prove his case was to bring in ten men; five were set on one side and five on the other, and a knife was tossed up in the space between them. The five towards whom the handle lay were then set aside; from the other

<sup>1</sup> Maine, *Early Law and Custom*, 144.

<sup>2</sup> Hessels & Kern col. 208, xxxvii; and see *ib.*, *Extravagantia*, B, p. 421; Lea, *Sup. and Force*, 3d ed., 40, 48.

<sup>3</sup> Lea, *Sup. and Force*, 3d ed., 35. Mr. Lea's excellent book is full of instruction.

<sup>4</sup> Palgrave, *Eng. Com.* i. 262-3. For its extensive use in the manor courts, see Selden Soc. Publications, vols. ii. and iv. The highly formal character which it sometimes took on, and the perils which attended it, are illustrated in a passage from an unpublished treatise of the fourteenth century, preserved by Professor Maitland in vol. iv. p. 17. All comes to naught if the principal withdraws his hand from the book while swearing, “or does not say the words in full as they are charged against him. . . . If a defendant fails to make his law he has to pay whatever the plaintiff has thought fit to demand.” We are told (Lea, *Sup. and Force*, 3d ed., 72) that in the city of Lille, down to the year 1351, the position of every finger was determined by law, and the slightest error lost the suit irrevocably.

<sup>5</sup> *Black Book of the Admiralty*, ii. 170-173.



five one was removed, and the remaining four took the oath as compurgators.

In criminal cases in the king's courts, compurgation is thought to have disappeared in consequence of what has been called "the implied prohibition" of the Assize of Clarendon, in 1166. But it remained long in the local and in the ecclesiastical courts. Palgrave<sup>1</sup> preserves as the latest instances of compurgation in criminal cases that can be traced, some cases as late as 1440-1, in the Hundred Court of Winchelsea in Sussex. They are cases of felony, and the compurgation is with thirty-six neighbors. They show a mingling of the old and the new procedure. On April 4, 1435, Agnes Archer was indicted by twelve men, sworn before the mayor and coroner to inquire as to the death of Alice Colyn-bourgh. Alice *adducta fuit in pleno hundredo . . . modo felonico, nuda capite et pedibus, discincta, et manibus deligatis; tendens manum suam dexteram altam, per communem clericum arreinata fuit in his verbis* (and then follows in English a colloquy): "Agnes Archer, is that thy name? which answered, yes. . . . Thou art endyted that thou . . . felonly morderiste her with a knyff fyve tymes in the throte stekyng, throwe the wheche stekyng the saide Alys is deed. . . . I am not guilty of thoo dedys, ne noon of hem, God help me so. . . . How wylte thou acquite the? . . . By God and by my neighbours of this town." And she was to acquit herself by thirty-six compurgators to come from the vill of Winchelsea, chosen by herself.

The privilege of defending one's self in this way in pleas of the crown was jealously valued by the towns. London had it in its charters. In the fifty Anglo-Saxon words of the first short charter granted by the Conqueror, and still "preserved with great care in an oaken box amongst the archives of the city,"<sup>2</sup> there is nothing specific upon this. But in the charter of Henry I., s. 6, the right of a citizen is secured in pleas of the crown, to purge himself by the usual oath; and this is repeated over and over again in charters of succeeding kings.<sup>3</sup> Henry III., in his ninth charter, cut down the right, by disallowing a former privilege of the accused to supply the place of a deceased compurgator by swearing upon his grave.<sup>4</sup>

<sup>1</sup> Com. ii., p. cxvi, note; compare ib. i. 217.

<sup>2</sup> Norton's London, 324, note.

<sup>3</sup> Of Henry II., Richard. John, Henry III., the three Edwards, and Richard II. For the charters, see Liber Albus, Mun. Gild. Lond. i. 128 *et seq.*

<sup>4</sup> Lib. Alb., Mun. Gild. Lond. i. 137-8; Riley's ed., 123, note.

There was the "Great Law," in which the accused swore with thirty-six freemen (six times, each time with six), chosen, half from the freemen of the east side of the rivulet of Walbrook, and half from the west; they were not to be chosen by the accused himself, nor to be his kinsmen or bound to him by the tie of marriage or any other. The accused might object to them for reasonable cause; they were chosen and *struck*, much after the way of a modern special jury. The "Middle Law" and "Third Law" were like this, but had eighteen and six compurgators respectively.<sup>1</sup> In civil cases of debt and trespass, compurgation with six others was the rule in London; or, if the defendant was not a resident, with only two others. If he had not two, then the foreigner was to be taken by a sergeant of the court to the six churches nearest.<sup>2</sup>

In the king's courts the earliest judicial records have many cases of this mode of trial; *e.g.*, in 1202, in the Bedfordshire eyre, where, in an action for selling beer by a false measure, the defendant was ordered to defend herself "twelve-handed," *i.e.*, by her oath, with eleven compurgators; and she gave pledges to make her "law" (*vadiavit legem*).<sup>3</sup>

From being a favored mode of trial, wager of law steadily tended to become a thing exceptional, not going beyond the line of the precedents, and within that line a mere privilege, an optional trial alongside of the growing and now usual trial by jury. In the newer forms of action it was not allowed, and finally it survived mainly in *detinue* and *debt*.<sup>4</sup> Yet within a narrow range it held a firm place. In 1440,<sup>5</sup> in *debt for board*, Yelverton, for plaintiff, tried to maintain that the defendant could not have his law of a thing "which lies in the *conusance* of the *pais*." But the court held otherwise and the defendant had his law. In 1454-5,<sup>6</sup> there was a great debate among the judges over a demurrer to a plea of *non*

<sup>1</sup> Liber Albus, Mun. Gild. Lond. i., pp. 57-59, 92, 104.

<sup>2</sup> A good Anglo-Saxon method. *Fleta*, Lib. 2, c. 63, s. 12, gives the merchants' way of proving a tally by his own oath in nine churches. He was to swear to the same thing in each, and then return to Guildhall for judgment.

<sup>3</sup> *Seld. Soc. Pub. i.*, case 61; *s. c. Palg. Com. ii.*, p. cxix, note. And so elsewhere abundantly, in the earliest records. *E.g.* in 1198-9, *Rot. Cur. Reg. i.* 200. And see *Glanville*, Bk. 1, cc. 9 and 16 (1187).

<sup>4</sup> *Steph. Pl.* (Tyler's ed.) 131-2.

<sup>5</sup> *Y. B.* 19 H. VI. 10, 25.

<sup>6</sup> *Y. B.* 33 H. VI. 7, 23.

summons in a real action, with "ready to aver per pais." It was insisted by Prisot (C. J.) that this lay in the knowledge of the pais, and that all such things should in reason be triable by the jury. He admitted, however, that the practice had been otherwise. His associates, Danvers and Danby, agreed with him; while Moyle and Ayshton pressed strongly the more conservative doctrine. "This will be a strong thing," said Moile; "it has not been done before." "Since waging law," said Ayshton, "has always been practised, and no other way, this proves, in a way, that it is *un positive ley*. All our law is directed (*guide*) by usage or statute; it has been used that no one wages his law in trespass, and the contrary in debt; so that we should adjudge according to the use," etc. No decision in the case is reported. But Brooke, in his Abridgment, in the next century, gives the latter view as *optima opinio*.

By 1587<sup>1</sup> compurgation seems not merely to have been unusual, but to have had an archaic look,—in the eyes, at any rate, of the Chancellor. We read that the Star Chamber refused to deal with one who was alleged to have sworn falsely in making his law; "the reason was because it was as strong as a trial. And the Lord Chancellor demanded of the judges if he were discharged of the debt by waging of his law; and they answered, 'yea.' But Manwood (C. B.) said that it was the folly of the plaintiff, because that he may change his action into an action of the case upon an assumpsit, wherein the defendant cannot wage his law." In his report of Slade's Case (1602) Coke remarks<sup>2</sup> that courts will not admit a man to wage his law without good admonition and due examination.

A century later it still keeps its place, but is strange and antiquated, and the lawyers and judges have lost the clue. In 1699, in the Company of Glaziers Case,<sup>3</sup> in a debt on a by-law, the defendant had his law. When he came with his compurgators, the plaintiff's counsel urged that the court need not receive him to his oath if he were swearing falsely or rashly; "sed, per Holt, C. J., 'We can admonish him, but if he will stand by his law, we cannot hinder it, seeing it is a method the law allows.'" The reporter takes the pains to describe the details of the proceeding,

---

<sup>1</sup> Goldsborough, 51, pl. 13.

<sup>2</sup> 4 Rep. p. 95.

<sup>3</sup> Anon., 2 Salk. 682.

as if they were unfamiliar. I give this in a note.<sup>1</sup> At the end of it all: "Per Northey (plaintiff's counsel), this will be a reason for extending indebitatus assumpsits further than before. Holt, C. J. We will carry them no further." In the next case where, in a similar matter two or three years later, the court refused wager of law in debt on a by-law, Holt, C. J., said that the plaintiff's counsel yielded too much in the Glaziers Case: "It was a gudgeon swallowed, and so it passed without observation." In 1701-2 came a great case,<sup>2</sup> where, in debt on a city by-law, for a penalty for refusing to serve as sheriff, the defendant offered to make his law with six freemen of the city, according to the custom of London. The plaintiff demurred. Much that was futile was said of wager of law. We are told by Baron Hatsell<sup>3</sup> that it lies only "in respect of the weakness and inconsiderableness of the plaintiff's . . . cause of demand . . . in five cases: first, in debt on simple contract, which is the common case; secondly, in debt upon an award upon a parol submission; thirdly, in an account against a receiver; . . . fourthly, in detinue; . . . fifthly, in an amercement in a court baron or other inferior courts not of record." Holt rationalized the matter in a different way:<sup>4</sup> "This is the right difference, and not that which is made in the actions, viz., that it lies in one sort of action and not in another; but the true difference is when it is grounded on the defendant's wrong; . . . for if debt be brought and . . . the foundation of the action is the wrong of the defendant, wager of law will not lie." And again,<sup>5</sup> "The secrecy of the contract which raises the debt is the reason of the wager of law; but if the debt arise from a contract that is notorious, there shall be no wager of law."

---

<sup>1</sup> "The defendant was set at the right corner of the bar, without the bar, and the secondary asked him if he was ready to wage his law. He answered yes; then he laid his hand upon the book, and then the plaintiff was called; and a question thereupon arose whether the plaintiff was demandable? And a diversity taken where he perfects his law instanter, and where a day is given in the same term, and when in another term. As to the last, they held he was demandable, whether the day given was in the same term or another. Then the court admonished him, and also his compurgators, which they regarded not so much as to desist from it; accordingly, the defendant was sworn, that he owed not the money modo et forma, as the plaintiff had declared, nor any penny thereof. Then his compurgators standing behind him, were called over, and each held up his right hand, and then laid their hands upon the book and swore, that they believed what the defendant swore was true."

<sup>2</sup> *London v. Wood*, 12 Mod. 669.

<sup>3</sup> *Ib.*, p. 669-70.

<sup>4</sup> *Ib.*, p. 677.

<sup>5</sup> *Ib.*, p. 679.

In the latter half of the eighteenth century it was nearly gone. Blackstone tells us: "One shall hardly hear at present of an action of debt brought upon a simple contract," but of assumpsit for damages, where there could be no wager of law: and so of trover instead of detinue. "In the room of actions of account a bill in equity is usually filed. . . . So that wager of law is quite out of use; . . . but still it is not out of force. And therefore when a new statute inflicts a penalty and gives . . . debt for recovering it, it is usual to add 'in which no wager of law shall be allowed;' otherwise an hardy delinquent might escape any penalty of the law by swearing that he had never incurred or else had discharged it."<sup>1</sup>

The ancient trial was, then, by this time, well nigh its end. The validity of it, indeed, was recognized by the Court of Common Pleas in 1805;<sup>2</sup> but in 1824, when for the last time it makes its appearance in our reports,<sup>3</sup> it is a discredited stranger, ill understood: "Debt on simple contract. Defendant pleaded *nil debet per legem*. . . . Langslow applied to the court to assign the number of compurgators. . . . The books [he says] leave it doubtful. . . . This species of defence is not often heard of now. . . . Abbott, C. J. The court will not give the defendant any assistance in this matter. He must bring such number of compurgators as he shall be advised are sufficient. . . . Rule refused. The defendant [say the reporters] prepared to bring eleven compurgators, but the plaintiff abandoned the action." It turned out then that it was not yet quite a ghost; and so in 1833 (Stat. 3 & 4 Will. IV. c. 42 s. 13) it was at last enacted by Parliament "that no wager of law shall be hereafter allowed."

V. *The Ordeal*. — Of trial by the ordeal (other than the duel) not much need be said. Nothing is older; and it flourishes still in various parts of the world. As the investigations of scholars

---

<sup>1</sup> Com. iii. 347-8. This clause had been usual in English statutes for a century or two, and it appeared also on this side of the water, in our colonial acts, even in regions like Massachusetts, where it is said that wager of law was not practised. Dane's Ab. i. c. 29, art. 8. In *Childress v. Emory*, 8 Wheat. 642, 675 (1823), Story, J., is of opinion that "the wager of law, if it ever had a legal existence in the United States, is now completely abolished."

<sup>2</sup> *Barry v. Robinson*, 1 B. & P. (N. R.), p. 297: "If a man," argued counsel, "were now to tender his wager of law, the court would refuse to allow it." . . . "This was denied by the court," adds the reporter.

<sup>3</sup> *King v. Williams*, 2 B. & C. 538.

discover it everywhere among barbarous people, the conclusion seems just that it is indigenous with the human creature in the earlier stages of his development.<sup>1</sup> Like the rest, our ancestors had it. Glanville, for instance, our earliest text-book (about 1187),<sup>2</sup> lays it down that an accused person who is disabled by mayhem *tenetur se purgare. . . . per Dei iudicium. . . . scilicet per callidum ferrum si fuerit homo liber, per aquam si fuerit rusticus*. This was found to be a convenient last resort, not only when the accused was old or disabled from fighting in the duel, but when compurgators or witnesses could not be found or were contradictory, or for any reason no decision could otherwise be reached.<sup>3</sup>

The earliest instance of the ordeal in our printed judicial records occurs in 1198-9,<sup>4</sup> on an appeal of death, by a maimed person, where two of the defendants are adjudged to purge themselves by the hot iron. But within twenty years or so this mode of trial came to a sudden end in England, through the powerful agency of the Church, — an event which was the more remarkable because Henry II., in the Assize of Clarendon (1166) and again in that of Northampton (1176), providing a public mode of accusation in the case of the larger crimes, had fixed the ordeal as the mode of trial. The old form of trial by oath was no longer recognized in such cases in the king's courts. It was the stranger, therefore, that such quick operation should have been allowed in England to the decree, in November, 1215, of the Fourth Lateran Council at Rome. That this was recognized and accepted within about three years (1218-19) by the English crown is shown by the well-known writs of Henry III. to the judges, dealing with the puzzling question of what to do for a mode of trial, *cum prohibitum sit per Ecclesiam Romanam iudicium ignis et aquae*.<sup>5</sup> I find no case of trial by ordeal in our printed records later than Trinity

<sup>1</sup> Patetta, *Ordalie*, c. I.

<sup>2</sup> Book xiv., c. i.

<sup>3</sup> It is worth remarking that civilization has not yet developed a satisfactory substitute for these tests of the barbarians, in cases where there is merely strong and persistent ground for suspicion; in such a case, for example, as a well-known instance of the drowning of a young woman at a leading summer resort (Bar Harbor) in 1887. In earlier days the ordeal would have been the trial there.

<sup>4</sup> Rot. Cur. Reg. 1. 204.

<sup>5</sup> Sacros. Conc. xiii. ch. 18, pp. 954-5. Rymer's *Foedera* (old ed.) 228, ib. (Rec. Com. ed.) 154, has one of these writs. Maitland quotes it in his *Gloucester Pleas*, p. xxxviii.

Term of the 15 John (1213).<sup>1</sup> We read then of these cases. One Ralph, accused of larceny, is adjudged to purge himself by water; he did clear himself, and abjured the realm. And so in another exactly like case of murder.<sup>2</sup> It was the hard order of the Assize of Clarendon that he who had come safely through the ordeal might thus be required to abjure the realm, a circumstance which recalls the shrewd scepticism of William Rufus when he remarked of the *judicium Dei* that God should no longer decide in these matters, — he would do it himself.<sup>3</sup> In the third case a person was charged with supplying the knife with which a homicide was committed, and was adjudged to purge himself by water of consenting to the act. He failed, and was hanged.

In England, then, this mode of trial lived about a century and a half after the Conquest, going out after Glanville wrote, and before Bracton. The latter is silent about it.

VI. *Trial by Battle*. — This is often classified as an ordeal, "a God's judgment." But in dealing with our law it is convenient to discriminate these, for the battle has certainly other aspects than merely that of an appeal to heaven. Moreover, it survived the ordeal proper for centuries. It had, also, no such universal vogue. Although it existed among almost all the Germanic people, the Anglo-Saxons seem not to have had it; but it came into England with the Normans in full strength. In Glanville, a century after the Conquest, we see it as one of the chief modes of trial in the

<sup>1</sup> Plac. Ab. 90, col. 2. Two of these cases are given in Seld. Soc. Pub. i., case 116, where also there follow three others, 119, 122, and 125, "of uncertain date."

<sup>2</sup> Patetta, *Ordalie*, 312, doubts the accepted opinion that the disappearance of the ordeal in England was thus due to the Lateran Council decree. He remarks, truly, that the action of the Council merely forbade ecclesiastics to take part in the ordeal, and adds that there is mention of the ordeal in Henry the Third's Magna Carta of 1224-5. But one is inclined to doubt whether Dr. Patetta had in mind the king's writs above referred to; those and the sudden cessation of the cases seem conclusive. As regards the mention of *legem manifestam* as late as the Magna Carta of 1224-5, it may, perhaps, be explained by the circumstance that this was a reissue of an earlier document. The mere *legem* of the former documents had already become *legem manifestam nec adjuramentum*, in the second reissue, of 1217. The phrase was also used for the battle as well as the ordeal in its narrower sense — the sense now under consideration. See Brunner's interesting comment on this passage of Magna Carta in *Zeits. der Sav.-Stift.* (Germ. Abt.) ii. 213. There occurs a reference to the ordeal in a record of 1221, but on examination it proves to be a statement that one Robert underwent the ordeal at a previous trial, which may well have been some years earlier. Maitland's *Gloucester Pleas*, case 383, and p. xxii; and notes on this case at p. 150, and on case 434, at p. 151.

<sup>3</sup> Cited by Brunner, *Schw.* 182.

king's courts: "A debt . . . is proved by the court's general mode of proof, viz., by writing or by duel."<sup>1</sup> "They may come to the duel or other such usual proof as is ordinarily received in the courts," etc.<sup>2</sup> Of the inferior courts, also, we are told that in a lord's court a duel may be reached between lord and man, if any of the man's peers makes himself a witness and so champion.<sup>3</sup> He, also, who gave the judgment of an inferior court might, on a charge of false judgment, have to defend the award in the king's court by the duel, either in person or by a champion.<sup>4</sup>

There is sufficient evidence that it was, at first, a novel and hated thing in England. In the so-called "Laws of William the Conqueror," it figures as being the Frenchman's mode of trial, and not the Englishman's. In a generation after the Conquest, the charter of Henry I. to the city of London grants exemption from it; and the same exemption was widely sought and granted, *e.g.*, in the cases of Winchester and Lincoln.<sup>5</sup> The earliest reference to the battle, I believe, in any account of a trial in England, is at the end of the case of Bishop Wulfstan *v.* Abbot Walter, in 1077.<sup>6</sup> The controversy was settled, and we read: "Thereof there are lawful witnesses . . . who said and heard this, ready to prove it by oath and battle." This is an allusion to a common practice in the Middle Ages, that of challenging an adversary's witness,<sup>7</sup> or perhaps to one method of disposing of cases where witnesses were allowed on opposite sides and contradicted each other. Brunner<sup>8</sup> refers to this, with Norman instances of the dates 1035, 1053, and 1080, as illustrating a procedure which dated back to the capitulary of 819, mentioned above at p. 52. Thus, as among nations still, so then in the popular courts and between contending private parties, the battle was often the *ultima ratio*, in cases where their rude and unrational methods of trial yielded no results. It was mainly in order to displace this dangerous, costly, and discredited mode of proof that the recognitions — that is to say, the first organized form of the jury — were introduced.

<sup>1</sup> Lib. 10, c. 17.

<sup>2</sup> Lib. 13, c. 11.

<sup>3</sup> Lib. 9, c. 1.

<sup>4</sup> Lib. 8, c. 9.

<sup>5</sup> Mon. Gild. Lond. i. 128, s. 5, and Thorpe, i. 502 — *quod nullus eorum faciat bellum*. Pike, Hist. Crim. Law, i. 448; Patetta, Ordealie, 307, 308.

<sup>6</sup> Essays in Anglo-Saxon Law, 379; s. c. Big. Plac. Ang. Norm. 19; Brunner, Schw. 197, 400-1.

<sup>7</sup> Lea, Sup. and Force, 3d ed., 111.

<sup>8</sup> Schw. 197-8; ib. 68, 401, citing Glanville, lib. 10, c. 12; lib. 2, c. 21.



These were regarded as a special boon to the poor man, who was oppressed in many ways by the duel.<sup>1</sup> It was by enactment of Henry II. that this reform was brought about, first in his Norman dominions (in 1150-52), before reaching the English throne, and afterwards in England, sometime after he became king, in 1154. Brunner (to whom we are indebted for the clear proof of this) remarks upon a certain peculiar facility with which the jury made head in England, owing, among other reasons, to the facts (1) that the duel was a hated and burdensome Norman importation, and (2) that among the Anglo-Saxons, owing to the absence of the duel, the ordeal had an uncommonly wide extension, so that when, a generation later than the date of Glanville's treatise, the ordeal was abolished, there was left an unusually wide gap to be filled by this new, welcome, and swiftly developing mode of trial.<sup>2</sup> The manner in which Glanville speaks of the great assize is very remarkable. In the midst of the dry details of his treatise we come suddenly upon a passage full of sentiment, which testifies to the powerful contemporaneous impression made by the first introduction of the organized jury into England.<sup>3</sup>

Selden has remarked upon the small number of battles recorded as actually fought.<sup>4</sup> The publications of the society which bears his honored name is now bringing to light cases of which he

---

<sup>1</sup> For instance, we are told that "Saint Louis abolished battle in his country because it happened often that when there was a contention between a poor man and a rich man in which trial by battle was necessary, the rich man paid so much that all the champions were on his side and the poor man could find none to help him." *Grandes Chroniques de France*, publiées par M. Paulin, Paris, vol. 4, p. 427, 430, al. 3. Cited in Brunner Schw. 297, note.

<sup>2</sup> Schw. 397.

<sup>3</sup> Glanville, lib. 2, c. 7. This well-known passage runs in substance thus: The Grand Assize is a royal favor, granted to the people by the goodness of the king, with the advice of the nobles. It so cares for the lives and estates of men that every one may keep his lawful right and yet avoid the doubtful chance of the duel, and escape that last penalty, an unexpected and untimely death, or, at least, the shame of enduring infamy in uttering the hateful and shameful word ["Craven"] which sounds so basely in the mouth of the conquered. This institution springs from the greatest equity. Justice, which, after delays many and long, is scarcely ever found in the duel, is more easily and quickly reached by this proceeding. The assize does not allow so many essoins as the duel; thus labor is saved and the expense of the poor reduced. Moreover, by as much as the testimony of several credible witnesses outweighs in courts that of a single one, so much does this process rest on greater equity than the duel. For while the duel goes upon the testimony of one sworn person, this institution requires the oaths of at least twelve lawful men.

<sup>4</sup> *Duello*, cc. 8 and 13.

probably never heard.<sup>1</sup> Such traces of the duel in England as are found before Glanville's time are collected in Bigelow's *Placita Anglo Normannica*. Very early cases from Doomsday Book, compiled by William within twenty years of the Conquest, are found here.<sup>2</sup> Selden<sup>3</sup> refers to a civil case in Mich. 6 Rich. I. (1194), as "the oldest case I have read of." This may be the case in Vol. I. of the *Rotuli Curiae Regis*, 23-24, 26, which appears to be the earliest one reported in the judicial records. Although the demandant here *hoc offert probare versus eum per Radulphum filium Stephani, qui hoc offert probare ut de visu patris sui per corpus suum sicut curia consideraverit*, and the defendant came and defended the right and inheriting of (the plaintiff), *et visum patris Radulphi filii Stephani, per Johannem . . . qui hoc offert defendere per corpus suum consideratione curiae*,—yet the case appears to have gone off without the battle on another point. But this record shows the theory of the thing. The plaintiff offers battle and puts forward a champion who is a complaint-witness, and who speaks as of his personal knowledge or, as in this case, on that of his father,<sup>4</sup> and stands ready to fight for his testimony. Before the battle the two champions swear to the truth of what they say.

In the mother-country, Normandy, one might hire his champion; but in England, theoretically, it was not allowed. In 1220 one Elias Piggun was convicted of being a hired champion, and lost his foot.<sup>5</sup> What was thus forbidden seems, however, to have been much practised, and finally, in 1275, the struggle to prevent it came to an end by abandoning any requirement that the champion be a witness. The St. West. I., c. 41, reads: "Since it seldom happens that the demandant's champion is not forsworn in making oath that he or his father saw the seisin of his lord or ancestor and

---

<sup>1</sup> If the lawyers knew how much they could promote the cause of legal learning, and thereby improve our law, by becoming members of this excellent society (it costs a guinea a year), they would not neglect the opportunity. The American Secretary is Professor Keener, of the Columbia Law School, in the city of New York.

<sup>2</sup> pp. 41, 42, 43, 61, 305.

<sup>3</sup> *Duello*, c. 13.

<sup>4</sup> Glanville, lib. 2, c. 3, sets forth that in this class of cases the plaintiff cannot be his own champion, for he must have a good witness, who shall speak of his own knowledge or that of his father. So in the recognition, substituted for the battle, the jurymen—the twelve witnesses of Glanville's eulogy, so much better than the one battle-witness—are to speak of their own personal knowledge, or by the report of their fathers, *et per talia quibus fidem teneantur habere ut propriis*. Ib., lib. 2, c. 17.

<sup>5</sup> Seld. Soc. Pub. i. 192; s. c. Bracton, 151 b.

his father commanded him to *devaign*, it is provided that the demandant's champion be not bound to swear this; but be the oath kept in all other points."

The Year Books indicate that trial by battle was not much resorted to. One sign of it is the particularity with which the ceremonial is described, as if it were a curiosity. Thus in 1342-3, and again in 1407,<sup>1</sup> in criminal appeals, the formalities of the battle oath and subsequent matters are fully given. And in 1422<sup>2</sup> the ceremony in a battle between champions is described with curious details, down to the defaulting of the tenant on the appointed day. In 1565 Sir Thomas Smith<sup>3</sup> tells us, of this mode of trial, that it was not much used, but "I could not learn that it was ever abrogated." This was only six years before the famous writ of right, in *Lowe v. Paramour*,<sup>4</sup> which furbished up this faded learning. Dyer has a pretty full and good account of that case; but Spelman's Latin<sup>5</sup> is fuller and very quaint. The trial in a writ of right, he tells us, repeating with precision the doctrine of four centuries and a half before, is by duel or the assize; *utrunque genus hodie insuetum est sed duelli magis*.<sup>6</sup> Yet, he goes on, it chanced that this last was revived in 1571, and battle was ordered, *non sine, magna juris consultorum perturbatione*. Then comes a curious detailed account, setting forth, among other things, how Nailer, the demandant's champion, in his battle array, to the sound of fifes and trumpets, on the morning of the day fixed for the battle, *Londinum minaciter spatiatur*. It has been said that Spelman was present at Tothill Fields on that day with the thousands of spectators that assembled; he does not say so, I believe, but he writes with the vivacity of an eye-witness. The plaintiff did not appear. Another like case occurred as late as 1638,<sup>7</sup> but there was no fight. Efforts to abolish the judicial battle were made through that century and the next, but without result. At last came the famous appeal of murder in 1819,<sup>8</sup> in which the learning of the subject

---

<sup>1</sup> Y. B. 17 Ed. III. 2, 6; s. c. Lib. Ass. 48, 1; Y. B. 9 H. IV. 3, 16.

<sup>2</sup> Y. B. 1 H. VI. 6, 29.

<sup>3</sup> Com. England, bk. ii. c. 8.

<sup>4</sup> Dyer, 301.

<sup>5</sup> Glossary, *sub voc.* Campus, A. D. 1625.

<sup>6</sup> How rusty the lawyers were in 1554, as regards the Grand Assize, is shown in *Lord Windsor v. St. John, Dyer*, 98 and 103 b.

<sup>7</sup> Cro. Car. 522; Rushworth's Coll. ii. 788.

<sup>8</sup> *Ashford v. Thornton*, 1 B. & Ald. 405.

was fully discussed by the King's Bench, and battle was adjudged to be still "the constitutional mode of trial" in this sort of case. As in an Irish case in 1815,<sup>1</sup> so here, to the amazement of mankind, the defendant escaped by means of this rusty weapon. And now at last, in June, 1819, came the abolition of a long-lived relic of barbarism, which had survived in England when it had vanished everywhere else in Christendom.<sup>2</sup>

The Grand Assize, also, that venerable original form of the jury which Henry II. established, with its cumbrous pomp of choosing for jurymen knights "girt with swords"<sup>3</sup> went out at the end of 1834, with the abolition of real actions.

We have now traced the decay of these great mediæval modes of trial in England. What, meantime, had been happening to the jury? That is a question to be answered hereafter.

*James B. Thayer.*

CAMBRIDGE, May 1891.

---

<sup>1</sup> Neilson, *Trial by Combat*, 330.

<sup>2</sup> Stat. 59 Geo. III. c. 46, — reciting that "appeals of murder, treason, felony, and other offences, and the manner of proceeding therein, have been found to be oppressive; and the trial by battle in any suit is a mode of trial unfit to be used; and it is expedient that the same should be wholly abolished." The statute went on to enact that all such appeals "shall cease, determine, and become void and . . . utterly abolished, [and that] in any writ of right now depending or hereafter to be brought, the tenant shall not be received to wage battle, nor shall issue be joined or trial be had by battle in any writ of right."

<sup>3</sup> Lord Windsor *v.* St. John, Dyer, 103 b.

## NEMO TENETUR SEIPSUM PRODERE.

**I**F there is one example which illustrates better than another the old allegory of the gold and the silver shields, it is the controversy that has attended the maxim *Nemo tenetur seipsum prodere*. If one instance better than another serves to exemplify the manner in which history may cover up the origin of a legal principle, destroy all traces of its real significance, change and recast its purpose and its use, while preserving an identity of form and leaving it with its vigor of life unabated and its legal orthodoxy untainted, it is this rule that no man shall be compelled to criminate himself. In both these aspects, historical and controversial, the story of this maxim is full of interest.

Yet of this contrariety of impressions some explanation must be possible, if only it be discoverable. If we can throw the light of history upon this rule from its first appearance down to the time when it received its final shape, we shall be better able to judge how firm is its basis in our system of law, and how strong a claim, merely by virtue of its history and its lineage, it ought to have upon our respect. We may then weigh intelligently the various contesting considerations and be prepared to make a final adjustment of the claims of this principle to the important place which it now occupies. This we need to do, not only for the sake of reaching a verdict upon the maxim itself, but as well for the purpose of examining the clusters of lesser rules that have grown out of it, and of correcting the anomalies that flourish among them. If our verdict is favorable, let us carry the principle to its logical extent and enforce it thoroughly; if unfavorable, let its influence be discouraged and let its operation be modified to the extent which our conclusion may require.

What, then, is the history of this rule? Space requires that only a brief sketch be given here, and the filling in of details, with references to the authorities, must be left for another occasion. Briefly, these things appear: 1st. That it is not a common-law rule at all, but is wholly statutory in its authority. 2d. That the object of the rule, until a comparatively late period of its exist-

ence, was not to protect from answers in the king's court of justice, but to prevent a usurpation of jurisdiction on the part of the Court Christian (or ecclesiastical tribunals). 3d. That even as thus enforced the rule was but partial and limited in its application. 4th. That by gradual perversion of function the rule assumed its present form, but not earlier than the latter half of the seventeenth century.<sup>1</sup>

These are the results in brief. Let us now turn to the evidence. We are taken back to the middle of the thirteenth century. It was an epoch marked by a stubborn antagonism between civil and ecclesiastical influences. The leaders of the church were of foreign culture, and through them was exerted the powerful influence of the papal see. The barons were engaged in that defence of English liberties and so-called popular rights, which was characterized by repeated defeats on the part of kings and by the signing of successive charters. Rather as an incident than otherwise of this general struggle, it came about that the canon law and the common law were placed in opposition. From the time of Henry III., and earlier, down to the days of the first James, it is apparent that there was a constant and irritating friction between the two systems. The proclamation of Stephen in proscribing the use of the civil law,<sup>2</sup> and the well-known order issued by Henry III., in 1235, in regard to the teaching of law in the city of London, are some of the earlier signs of the extent and importance of the conflict.

When Henry married his French wife, in 1236, there came over with her to England her four uncles, one of whom, Boniface, was placed in the see of Canterbury,—according to one authority,—as archdeacon. In the same year, 1236 (Matthew Paris says 1237), there came over a Cardinal Otho (whose constitutions have always been regarded as of high authority), and in a conference (*Concilium Pananglicanum*) held at Saint Paul's in the same year he promulgated a constitution ordaining that the oath against calumny (*jusjurandum calumniæ*) be required in every ecclesiastical

---

<sup>1</sup> Some interesting evidence, in a line with what will be here offered, may be found in Bentham's *Judicial Evidence*, vol. 5, book 9, c. 3, 4. In his brief account (to which I had not referred until the present material was quite collected) special attention is called to the absence of the privilege in common-law practice before the seventeenth century.

<sup>2</sup> Probably 1154. See Wilkin, *Leg. Ang. Sax.* 318. Joh. Sarisb., *Policraticus*, l. lib. 8, c. 22 b.

suit, "*obtenta consuetudine in contrarium non obstante*," notwithstanding the previous custom to the contrary.<sup>1</sup> This *jusjurandum calumniæ* was an oath which, according to ecclesiastical practice, each party might take at the beginning of a suit, affirming among other things that he would answer truly to every question that might be asked him. It was practically identical with the oath *ex officio*, which afterwards came into prominence in the course of the controversy. What is to be noted in particular is that the phrase, "*obtenta consuetudine in contrarium non obstante*," refers to the practice obtaining in the ecclesiastical courts before that time. So far as the accessible evidence indicates, this decree was the first instance of the employment of this oath in England.

The passage rises into importance, because Coke<sup>2</sup> has endeavored to found upon it an argument that the custom and therefore the common law of England before this date forbade such oaths to be required, and that subsequent statutes, to which reference will be made, were therefore only declaratory of the common law. But nothing could be more wide of the mark. The only ground offered by Coke for his opinion was this clause, the meaning of which he entirely misapprehended. That it refers, not to a custom of the king's courts (of which the newly arrived cardinal could have had only the slightest knowledge), but to the previous practice in the Courts Christian, appears not only from the context of the constitution,<sup>3</sup> but from direct statements in the annotations of Athon as well.<sup>4</sup> This oath had always been administered, according to the canon law, in civil causes, but not in causes purely spiritual;<sup>5</sup> and in requiring it in the latter instances, Otho made an innovation which "*per expertam considerationem*" has ever since found a place in ecclesiastical practice.

Possibly, in the case of Coke, his wish fathered his opinion, for in later days (1589), as we shall see, he held a brief on behalf of one who objected to the administration of this oath; and as, between that time and the publication of his book, the highest judicial authorities had solemnly declared that this oath could be lawfully administered, the discovery of a common-law foundation for the statutory principle which he was supporting in the face

<sup>1</sup> Lindwood, 60; 12 Co. 68; Gibson's Codex, 1010.

<sup>2</sup> 2 Inst. 667.

<sup>3</sup> Lindwood, 61, notes (b), (c).

<sup>4</sup> Otho's constitutions were annotated by Actonus, known as Athon, Canon of Lincoln, who flourished about 1290, in the reign of Edward I.

<sup>5</sup> Corp. Jur. Canon., *De Juramento Caluminiæ*, 1, 2.

of an enormous opposition would have been a rich boon to him. It is hard to escape the belief that Coke was wilfully blind to the real meaning of the passage. Not only is there no evidence in favor of Coke's belief, but the absence of any previous practice of requiring this oath in the Court Christian in the class of cases which caused the controversy (cases of ecclesiastical offences) makes it almost impossible that any opportunity could have arisen for resistance to such a practice, and for the establishment of a custom to the contrary. That any rule against the imposition of such an oath could have arisen of itself is not only contrary to the mode of development of the common law, but is entirely unlikely to have sprung up among a people familiar with the system of compurgation oaths. Add to this that a negative custom, in the sense of a custom binding as law, is a rare thing, and that in this case the rule would much more probably have arisen, if at all, through a decision as a statute, and not as a custom; for custom develops by unanimous consent, not in the midst of hot controversy.

Soon after this constitution of Otho came another, from Boniface (1272), employing the same method of procedure. It recited that in the course of investigations by the prelates "*de criminibus et excessibus subditorum suorum*," the layman "*suffulti potestate temporalium dominorum, in hujusmodi inquisitionibus citate, nolunt jurare de veritate dicenda*," it ordered an inquisition and the application of the oath to witnesses.<sup>1</sup>

It does not appear that these decrees of Otho and Boniface met with any more opposition than other acts done in assertion of the ecclesiastical jurisdiction. The reign of Edward I. was apparently a time when the royal power favored the churchly claims, for by the statute 13 Ed. I., *Circumspecte Agatis* (1285), the jurisdiction of the Court Christian was materially enlarged. But in the statute known as "*Prohibitio formata de statuto articulorum cleri*" a change of policy occurred, and the foundation was laid of the privilege now under discussion. This statute enacted that the officers of the law should not permit "*quod aliqui laici in ballione sua in aliquibus locis conveniant ad aliquas recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis*." There can be no doubt that this was the earliest legal opposition which the prelates encountered in their imposition of the oath.

---

<sup>1</sup> Lindwood, 109; 2 Co. 26.



It was the starting-point of to-day's rule. It is with the fortunes of this statute and its successors that we are now chiefly concerned. The date of the act is placed by Cay and other editors as of *tempore incerto* before the end of Edward II.'s reign (1326), while Coke attributes it to the first few years of Edward I.'s time.<sup>1</sup>

No reasons are given by the latter, however, and it seems unlikely that the administration which enacted *Circumspecte Agatis* could also have passed so stringent a law as the *Prohibitio Formata*. It is more probable that it belongs in the reign of Edward II. (1307-1326).

It is noticeable that the exception peculiar to this statute, "*nisi in causis matrimonialibus et testamentariis*," appears again and again, in the succeeding years, alike in the vehement protests of the clergy and in the various royal prohibitions issued to curb the zeal of ecclesiastical officers. But the significant point about the statute is that its object was the general one of restricting the ecclesiastical jurisdiction, and the prohibition of citations to take oaths was incidental only, and was simply a means to the chief end. Just as the surest bar to a plaintiff's recovery in a common-law suit was the non-existence of a writ covering his case, so the best method of curtailing the ecclesiastical jurisdiction was to cut off that power to summon and examine which was the strength of their procedure.

That a repugnance to the oath itself did not exist, is shown by the exception in favor of *causis matrimonialibus et testamentariis*. Moreover, the statute begins by forbidding the ecclesiastical courts to take cognizance of various "matters and causes of money, and of other Chattels and Debts which are not of Testament or Matrimony," thus revealing that its real point of attack was the scope of the ecclesiastical jurisdiction. Such, too, has been the accepted significance of the law in later times. Britton understood it as preventing the ecclesiastical courts from entertaining any pleas—that is, suits—other than matrimonial and testamentary.<sup>2</sup> In the annals of later ecclesiastical practice, this statute is remembered chiefly, if not solely, as the origin of the limited jurisdiction of Courts Christian.<sup>3</sup> Furthermore, the prohibition applied only to laymen, which suggests, on the one

---

<sup>1</sup> Cay, *Statutes of the Realm*, I. 209; 2 Co. 600.

<sup>2</sup> Nichol's Britton, 35.

<sup>3</sup> See also the forms of the prohibitions in F. N. B., 41 A, and Reg. Brev. 346.

hand, that nothing was aimed at the oath, as in itself an object of dislike, and, on the other, that the moving influence was a jealousy of the hold the clergy were obtaining on the laity and a desire to restrict their power to persons and matters purely spiritual.

But the clergy did not accept this check as final, and the struggle continued. Articles were presented to Edward II., vainly protesting against the narrowness of their powers.<sup>1</sup> In Henry IV.'s time they found an administration more favorable to their cause, and a reaction took place. A statute of 2 H. IV. (1403) gave the church permission to use all the sanctions or "methods" authorized by its canons, and under this clause the oath began again to be administered. In 1408 we find Archbishop Arundel directing his clergy to denounce as heretics all who spoke against the administration of oaths by ecclesiastics.

But the tide turned once more against the church, and we find a statute of 28 H. VIII. (1533) repealing the statute of H. IV., and leaving the law as it stood before. This new statute was directed against certain clerical abuses; but it is apparent from the preamble that, in the movement of opposition now beginning, the grievance of the people and of the commons was the oath itself, or rather the detestable methods attending the church's use of it, quite as much as the general jurisdiction of the church.

At this time, then, the law stood that oaths could be administered (by ecclesiastics) to the clergy in all cases, and to laymen in matrimonial and testamentary causes. In 1 Phil. and M. the statute of H. VIII. was repealed, but 1 Eliz. saw it restored. The statute of H. VIII., however, is not heard of again for many years, and it is likely that the agitation which gave it being would have died out had not a powerful engine for the discovery of heretics now made its appearance, — the High Court of Commission, appointed by virtue of the supreme ecclesiastical authority of Elizabeth. Up to 1583 five commissions had been issued, but until the sixth, in that year, no great murmuring seems to have been heard. Now, however, Archbishop Whitgift, a man of stern Christian zeal, determined to crush heresy wherever its head was raised, was placed in charge of a commission which proceeded immediately to examine clergymen and other

---

<sup>1</sup> See 9 E. II., *Articuli Cleri*; Cay, *Statute of the Realm*, I. 171; see also Athon, pt. 3. p. 47.

suspected persons upon oath. From this time forward there is much concerning the oath. But the course of past practice had by no means been changed, in obedience to the statute of H. VIII. The temper of Elizabeth and of the zealous Whitgift inclined to a strong, ecclesiastical administration. The law of Henry was there on the books, but it took nearly one hundred years to win the struggle against ecclesiasticism and to put life into the statute.

There is abundant evidence of the fact that the statute of H. VIII. had by no means become generally known and carried out in ecclesiastical practice. Even as late as 1610 it seems that the Commons conceived that there was no good remedy by law against the inquisitional proceedings of the High Commission, and they remonstrated and tried to pass bills. But the clearest proof is found in the very law reports themselves, where the interpreters of the law were found ignoring the claims of this statute. The subject came up in most of the courts, though at different times in each. The earliest discoverable case in the reports is *Collier v. Collier*, in the Court of Common Pleas, in 1589. A suit for incontinence had been begun, and the defendant prayed for a prohibition, citing the writ upon the statute of E. II., as found in Fitzherbert and in the Register. According to one report, "the court would advise of it," and no decision was reached.<sup>1</sup> According to another report, the prohibition was granted.<sup>2</sup> Coke was the petitioner's attorney, and his claim was that "*nemo tenetur seipsum prodere* in such cases, but only in *causis mater. et test.*," "where," he added, "no discredit can be to the party by his oath." In Moor, 906, this appears as the ground of the decision. But in 1591 the King's Bench (Wray, C. J., Gawdy and Anderson, JJ.) refused to sustain an indictment for administering the oath against incontinence, on the ground that the oath could be lawfully administered where the offence was first presented (that is, informed of) by two men, and in this case there had been a proper presentment.<sup>3</sup> Thus, as we shall see, the court sustained the strict ecclesiastical rule, but ignored the statute. Finally, in 1591, the case of Cartwright, who had been for some time languishing in the hands of Whitgift, protesting against the imposi-

---

<sup>1</sup> 4 Leon. 194; Nelson, Prohibition, E. 5.

<sup>2</sup> Cro. El. 201.

<sup>3</sup> Dr. Hunt's Case, Cro. El. 262.

tion of the oath, was brought up again, and an opinion was given upon it by the Chief Justices of the Common Pleas and the King's Bench, the Chief Baron of the Exchequer, Serjeant Puckring, and the Queen's Attorney-General and Solicitor-General, to the effect that the refusal of Cartwright and his followers to take the oath was wrong.<sup>1</sup> This was correct enough, from the point of view of the statute, as to Cartwright, who was a minister; but his companions in durance were chiefly laymen. The court evidently intended to adopt the ecclesiastical contention. Thus in 1591 we have the King's Bench and the highest legal personages promulgating the church's rule and slighting the statute. Since Anderson, a judge of the King's Bench in 1590, afterwards (1592) filled the chief justiceship of the Common Pleas until Coke took it in 1606, this doctrine must have subsequently had a representative in the Common Pleas also.

But in 1603 James came to the throne, and the whole aspect of affairs seems now to change. In that interval of a dozen years much, apparently, had been done and said which had tipped the balance in the opposite direction. From this time the ecclesiastical cause begins gradually to decline. Before noting the decisions which mark this decline, let me call attention to two incidents which emphasize the change that had occurred. In 1583, Whitgift had prepared a list of interrogatories for certain ministers, touching their conformity, and they had appealed to Lord Burleigh to protect them. Burleigh mildly expostulated with the Archbishop, protesting that "this is not a charitable way." But the Archbishop answered firmly, and declared "it is so cleere by law that it was never hitherto called into doubt;" and mentioned a case (unreported, apparently) in Elizabeth's time where certain ones were committed to the Fleet for counselling J. S. and other papists not to answer upon their oaths.<sup>2</sup> Now, in 1603<sup>3</sup> the king called a conference of the clergy, "a famous Disputation and Examination into the Customs and Practices of this Church." In the course of a discussion about the granting of commissions by archbishops, one of the lords referred to the proceedings of these commissions, compared them to the Spanish Inquisition, and spoke of the oath *ex officio*, by which persons were forced to accuse themselves, and mentioned the case in which Burleigh had

---

<sup>1</sup> Strype's *Life of Whitgift*, 360, App. 138.

<sup>2</sup> Strype's *Whitgift*, p. 160.

<sup>3</sup> *Ib.* 568.

intervened, twenty years before. The crafty Whitgift then protested that the noble lord was in error, "for if any Article did touch the Party in any way, either for Life, Liberty, or Scandal, he might refuse to answer," and that his own answer to Burleigh would doubtless have satisfied the noble lord, but that as to a matter twenty years old his memory failed him. Now, in that letter to Burleigh he had, in fact, not only not made any such exception, but had vigorously defended each and every article as lawful. The new notion had, in 1603, begun to gain currency, and he realized it. One more example. When Cartwright's case came up in the Star Chamber, in 1600 or thereabouts, he made a strong defence on the ground of the unlawfulness of the oath. He was asked why he had not made the same defence twenty years before, when he was first apprehended, instead of saying merely, as he did, that such inquisitions were "contrary to the laws both of God and of the land," and that he did not wish to prejudice others by his answers. He answered that by the example of others in refusing he was induced to search farther, and had learned more than he knew twenty years before.

Let us now review hastily the decisions of the seventeenth century, bearing in mind, first, that the only legal basis for them was the statute of Edward II., as revised by those of Henry VIII. and Elizabeth; and, secondly, that the essence of the contest was a recoil against the power and methods of the ecclesiastical authorities, and that it resulted only by a kind of accident in abolishing inquisitorial oaths altogether, and establishing a general privilege against self-crimination. Only sixteen years after the last solemn opinion rendered by the highest judicial authorities, the Commons asked the opinion of the justices upon the lawfulness of the oath administered in the ecclesiastical courts; and they, with Coke, Chief Justice of the Common Pleas (then recently appointed, in 1606), as their spokesman, answered<sup>1</sup> that the administering of any corporal oath was unlawful, by the statute of 25 H. VIII., except in causes matrimonial and testamentary. This was an official denial of the validity of the ecclesiastical rule, and it seems to have had speedy effect, for before long we find both the King's Bench and the Common Pleas upholding this policy, so foreign to the decisions of 1591. In 1609, in *Mansfield's Case*, presumably in the King's Bench,<sup>2</sup> it was held that a clergyman could be examined

---

<sup>1</sup> 12 Co. 26.

<sup>2</sup> Rolle's Abr., Prohibition (J), 4.

on his oath for preaching contrary to the prayer-book, "for clergymen are not within the statute." In 1610 the case of *Clifford v. Huntley*, probably in the same court,<sup>1</sup> held that where an answer might show the forfeiture of an obligation, one could not be compelled to answer on oath, and a prohibition would issue. A similar decision was rendered in *Bradston's Case*, in 1614.<sup>2</sup> In 1615, when the case of *Dighton v. Holt* came before the King's Bench for a prohibition to restrain the High Court of Commission from examining certain persons on oath as to their prayer-book practices, it seemed as though the statute of Henry VIII. was again to be disobeyed, and the rule of 1591 to be revived. For a year or more the case dragged on. Six adjournments took place, on more than one occasion for the express purpose of conferring with the High Court and asking them to put an end to the cause of complaint. Coke (who had become Chief Justice in 1613) evidently dreaded to be forced to decide upon his convictions (which dated as far back as the case in 1590) and against the ecclesiastical powers; but it was finally decided that the High Court had no power to examine the accused persons on oath.<sup>3</sup> A similar decision was reached in *Jenner's Case* in 1620.<sup>4</sup> In 1616 a prohibition was granted against the Court of the Arches, which was on the point of putting Sir William Smith to his oath concerning a transaction alleged to have involved covin and fraud.<sup>5</sup>

Of these cases the most important was *Dighton v. Holt*, and we gather from it two results: (1) that the matter practically still hung in the balance, and (2) that the question was essentially one of the extent of the authority of the ecclesiastical courts. In this case, furthermore, we find Coke laying it down as one reason for granting the prohibition, that the petitioner was brought in danger of a penal law. It had already been said, variously, that the liability to the forfeiture of an obligation, and the liability to be informed against, were reasons for the rule; but this reason seems first to have appeared in this case. Coke's statement, that it was the ground for the decision in *Hinde's Case*, was entirely incorrect;

---

<sup>1</sup> Rolle's Abr., Prohibition (J), 6; Jura Eccles. 427, 7.

<sup>2</sup> K. B.; Rolle's Abr., Proh. (J) 1; Jura Eccles. 355, 9.

<sup>3</sup> Bulstr. 48; imperfectly reported in Moor. 840; 2 Cro. 388.

<sup>4</sup> Probably K. B.; Rolle's Abr., Proh. (J) 5; Jura Eccles. 427, 6.

<sup>5</sup> Spendlow v. Smith, Hob. 84; Jura Eccles. 428.

and may we not suspect that the same is true of another case, not discoverable, also cited by him?<sup>1</sup>

This series of decisions would seem to have established the foundation of the rule which soon afterwards came to be regarded as having a common-law origin, and ultimately took the shape of the present privilege against self-crimination. But nothing can be clearer than that it was a statutory rule, and was so regarded. Many other cases occur in which the rule was disputed in one aspect or another, and the statutory authorities, already referred to, were frequently cited; but after 1620 no other case seems to occur until 1658. At this point, however, upon a bill for relief and discovery, brought on a charge of evading customs laws and attempting bribery, the whole ground was fought over again, in the case of Attorney-General *v. Mico*,<sup>2</sup> and the matter was again left in an uncertain condition. With Hardres and Archer for the plaintiff, and with Atkins, Stephen, and Shafter for the defendant, the arsenal of arguments was searched and numbers of (apparently) unpublished precedents were brought out on either side. The idea of a conflict of jurisdiction as the reason for claiming the privilege against self-crimination appears throughout the defendant's argument. The court, however, rendered no decision. The time had not yet come for the adoption of the privilege in the civil courts. In 1662 a case of a similar sort in the Exchequer<sup>3</sup> was adjourned without decision, though the court inclined to the plaintiff's side. In *Scurr v. Chancellor of York*, in 1664,<sup>4</sup> the question again arose upon a demand for a prohibition, the plaintiff having been examined on oath on a charge of keeping his hat on in church; but the case was never decided, according to one report; was decided upon a different ground, according to another report. Keble says that the court was divided. But in *Taylor v. Archbishop of York*,<sup>5</sup> and in *Goulson v. Wainwright*,<sup>6</sup> in 1669, the statutory rule was enforced,

<sup>1</sup> Hinde's Case, Dyer, 175 (1559), is a mere note, but the absence of any reference to the statute shows how little recognition it had received at that time. The king had appointed a commission to examine into the title of an officer, Skrogs, the clerk of a justice. Skrogs refused to answer, and he was committed to the Fleet. But he was released by the justices of the Common Bench, because "he was a person of the court and necessarie member of it." Now, the reporter adds, "*Simile M. 18, fo, p Hind, who refused jurare coram justiciis ecclesie super articulas pro usura.*"

<sup>2</sup> Exch., Hard. 139.

<sup>3</sup> Attorney-General *v.* —, Hard. 201.

<sup>4</sup> Sid. 232; 1 Keb. 812; quoted in 2 Lev. 247.

<sup>5</sup> K. B.; 2 Keb. 252; Jura Eccles. 362.

<sup>6</sup> Sid. 374.

Only one more case seems to have occurred in which the rule was disputed with any vigor, but on this occasion its very foundations were assailed. The struggle to overthrow it was like the last great revolt of a once powerful idea, when the result hangs for a time in suspense, and the unsuccessful cause is at last crushed out forever. This was the case of *Farmer v. Brown*, in 1679.<sup>1</sup> The plaintiff raised the point that the Ecclesiastical Court could administer an oath only *in causis matrimonialibus et testamentariis*; the defendant denied that the court was restricted to such causes. A prohibition was finally granted. It appears from the language in the case that the privilege of refusing to answer was already put forward as of general validity, that it rested no longer merely on the antagonism of two jurisdictions, but was a privilege to be claimed in any court whatever. The cases henceforward are occupied only with developing the details of the principle.

Meanwhile, however, and before the last five cases had occurred, two statutes had intervened to push the matter beyond the need of decisions. It is probable that the second of the two was the result of the discussion in *Attorney-General v. Mico*, in 1868. The first of these was 16 Car., I. c. 2 (1641), and provided that no one should impose any penalty in ecclesiastical matters, nor should "tender . . . to any . . . person whatsoever any corporal oath whereby he shall be obliged to confess or accuse himself of any crime or any . . . thing whereby he shall be exposed to any censure or penalty whatever." This probably applied to ecclesiastical courts alone. The second (13 Car. II., c. 12, 1662) is more general, providing that "no one shall administer to any person whatsoever the oath usually called *ex officio*, or any other oath, whereby such persons may be charged or compelled to confess any criminal matter." It would seem that these enactments should have settled the matter beyond all doubt in 1641, or at any rate in 1662; but in fact we find these last few cases in the King's Bench and the Exchequer mooting the question apart from the statutes, and seemingly in entire ignorance of them. The statute of 13 Car. II. is cited in *Scurr's Case*, but otherwise neither of them seems to have been mentioned; nor do the text-books, as a rule, take any notice of them. Henceforward, however, no question arises in the courts as to the validity of the privilege against self-crimina-

<sup>1</sup> 2 Lev. 247; T. Jones, 122; 1 Vent. 339; Nelson's Abr., Prohibition, F. 20.



tion, and the statutory exemption is recognized as applying in common-law courts as well as in others.<sup>1</sup>

A brief space must suffice for referring to two other interesting aspects of our subject, — first, the origin of the maxim *nemo tenetur*, etc., as applied to the privilege in question; secondly, the definition and limitation of the privilege, as it appeared in the common-law courts after the seventeenth century.

The fact is that the maxim *nemo tenetur* was an old and established one in ecclesiastical practice. Experience had resulted in the adoption of a principle very similar to the common-law rule requiring a presentment in the shape of an indictment or an information, before a subject might be put upon his trial. It was the practice that whenever a prosecution was instituted by some informer or other third party, the oath need not be taken as to the crime charged (though questions on other matters were allowed); but if the Ordinary proceeded upon a presentment, the accused was obliged to purge himself by his oath as to *criminis ipsius*. The whole rule was embodied in the maxim, "*Licet nemo tenetur seipsum prodere, tamen proditus per famam tenentur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare.*"<sup>2</sup> This was the form of the rule about 1590 or 1600, when the struggle between the two jurisdictions was at its height. There was more or less pamphleteering on the subject of the oath; and finally a judgment of nine civilians was given, establishing the lawfulness of the oath in canonical practice, and laying down the above rule.<sup>3</sup> As late as 1749 the influence of the same rule seems to have remained, for in a book of practice of that time<sup>4</sup> it is said, after referring to the defendant's privilege of non-crimination, that "if the fame of it is proved or confessed, the defendant ought to answer to the positions (charges), although they be criminal, or if he doth refuse, he is to be pronounced *pro confess*, after being admonished to answer." The maxim *nemo tenetur*, therefore, never meant, in its proper sphere, what it

<sup>1</sup> *Rex v. Lake* (Exch.), 1665, Hard. 364; *Penrice v. Parker* (Ch.) 1673, Finch; *Anon.*, 1 Vern. 60, 1682; *Bird v. Hardwicke*, 1 Vern. 109 (1682); *African Co. v. Parish*, 1691, 2 Vern. 844; *Sir Basil Firebrass' Case* (Ch.), 1701, 2 Salk. 550.

<sup>2</sup> "Though no one is bound to become his own accuser, yet when once a man has been accused (pointed at as guilty) by general report, he is bound to show whether he can prove his innocence and to vindicate himself."

<sup>3</sup> *Strype's Whitgift*, p. 339, App. 136, *et passim*.

<sup>4</sup> *Conset's Practice of Spiritual Courts*, p. 384, part vii. c. 1, 6.

now stands for. *Prodere* was used in the sense of "to disclose for the first time," "to reveal what was before unknown." The whole maxim, far from establishing a privilege of refusing to answer, expressly declares that answers must be given, under certain conditions (which are always fulfilled at trials in our courts of justice). It is certainly a satisfaction to learn that, after all, no such maxim as "no one ought to be obliged to say whether he is guilty," was ever formulated by the European jurists. We have in later years accepted it, with its Latin dress, as a supposed bequest from earlier thought, but our present rule never possessed any such sanction. It must stand, if at all, upon its merits alone.

So far as I have been able to discover, the first person to use the four words *nemo*, etc., apart from their context was Coke himself, in the case of *Collier v. Collier*. Coke's integrity hardly appears to advantage in the history of this controversy. He gave forth an erroneous interpretation of Otho's statement, which a sincere man can hardly be imagined as making; he misquoted Hinde's Case to his own advantage, where no opportunity for error seems to offer itself; and now he is found employing in his argument a partial and misleading statement of this rule of ecclesiastical practice. However this may be, it is certain, on the one hand, that the maxim as it is in use to-day was, in its origin, the broken half of a rule of quite the contrary import; and, on the other, that its currency was gained and its present sense acquired in the course of the controversy of the seventeenth century.

This maxim, or rather the abuse of it in the ecclesiastical courts, helps in part to explain the shape which the general privilege now has taken. The exact circumstances of the transition are somewhat obscure, perhaps necessarily so. But we notice that most of the church's religious investigations, the cause of all the trouble, were conducted by means of commissions or imquisitions, not by ordinary trials upon proper presentment; and thus the very rule of the canon law itself was continually broken, and persons unsuspected and unbetrayed "*per famam*" were compelled, "*seipsum prodere*," to become their own accusers. This, for a time, was the burden of the complaint. In 1589, for example, we read, in a protest by "divers of these persons required to make answer upon their oaths," that "they are not bound to accuse themselves; that in accusing others they should violate

the laws of friendship; that they will not serve as informers for their brethren."<sup>1</sup> So, in the cases of *Collier* (1589), *Bradston* (1614), and *Dighton v. Holt* (1615), *ante*, the same idea appears, that a man ought not "to discover sufficient matter for an Informer to Inform against him on the Statute." Furthermore, in rebelling against this abuse of the canon-law rule, men were obliged to formulate their reasons for objecting to answer the articles of inquisitions, and they naturally used such expressions as that to answer "would draw them in danger of a penal law," "would discover the forfeiture of an obligation," "would bring temporal punishment or loss." They professed to be willing to answer ordinary questions, but not to betray themselves to disgrace and ruin, especially where the crimes charged were, as a rule, religious offences, and not those which men generally regard as offences against social order. In this way the rule began to be formulated and limited, as applying to the disclosure of forfeitures and penal offences.

In the course of the struggle the aid of the civil courts was invoked. The contest as thus fought out and the privilege as finally established had sole reference to the usurpations of the ecclesiastical courts. But the issue had been so important a one, and men's minds had become so familiar with the idea of this privilege, that it began to be stated in general terms; and towards the end of the seventeenth century, as we have seen, it found a lodgement in the practice of the Exchequer, of Chancery, and of the other courts. There had never been in the civil courts any complaint based on the same lines, or any demand for such a privilege. The latter jurisdictions seem to have been quite free from anything of the sort. But the momentum of this right, wrested from the ecclesiastical courts after a century of continual struggle, fairly carried it over, and fixed it firmly in the common-law practice also.

And now what shall we say of this privilege to-day? It had a use once. Has it a use now? There was a demand for it three centuries ago, as a safeguard against an extraordinary kind of oppression, which, like witchcraft, has passed away forever. Is there a demand now? I think that the history of the privilege shows us that in deciding these questions we may discard any sanction which its age would naturally carry. As a bequest of

---

<sup>1</sup> Strype's *Whitgift*, 331.

the seventeenth century, it is but a relic of controversies and dangers which have disappeared. As a rule of canon law, it never was accepted as we accept it; the experience of the civilians led them in reality to quite opposite conclusions. We may, therefore, disregard sentiment and the supposed weight of experience, for there is no place for them.

As to its intrinsic merits, then, may we not express the general opinion in this way, that the privilege is not needed by the innocent, and that the only question can be how far the guilty are entitled to it? This fact, that no innocent man needs to claim this privilege, has always been the strong argument with those who attack it. The weakness of its defenders has lain in their habit of insisting that it has indispensable advantages for those who are groundlessly accused, and in their failure to face directly the question of real difficulty and doubt, whether or not some concession should not be made for the benefit of the guilty. I imagine that to-day the average lawyer, as well as the average layman, if asked for his candid opinion, would admit that in the nature of things there is no reason why, if an accused person is innocent, he should be unwilling to say so, and to explain the facts of his conduct and vindicate himself, — always assuming, of course, that a charge has been made with proper solemnities, and that he is not called upon, in inquisitorial style, to answer hasty accusations without weight. The same lawyer (for I cannot imagine a layman adding a "but" to this view) would add, however, that his fear was that even the innocent man might be trapped and entangled into damaging statements by the wiles of the cross-examiner. If this be so, then surely the evil lies in an abuse of that potent force, cross-examination, and a remedy can be applied where it is needed. Cross-examination, and not trial by jury, as an able Japanese lawyer once said to me, is the real glory of Anglo-American procedure; but there can be no doubt that cross-examination, in its native regions, has been allowed to run wild, and justice has suffered in consequence. If cross-examination endangers an innocent man, it is the abuse, not the proper use of it, which is to blame.

When we come to consider what allowance should be made for the guilty, we perceive immediately that there is ample ground for restricting and defining the liability to be brought to book for one's misdoings. We acknowledge, by our statutes of

limitation and our periods of prescription, that there is a time beyond which it is not expedient to redress wrongs and to punish crimes. In the same way there are limits to the places where, and the occasions when, investigations into wrongs and crimes may with profit be made. Disproportionate inconvenience, needless annoyance, continual opportunity for the gratification of personal spite and malevolence, a natural and inevitable fear of the witness-stand as a place of inquisition and a resulting injury to justice, — these are some of the consequences which warn us against subjecting the guilty to an unlimited liability of interrogation. Justice is above all a practical aim, and human nature must be taken as it is. It is useless to demand that the privilege shall be totally abolished. As has happened so often in Anglo-American jurisprudence, a principle inherited from the days of Brian or Coke or Hale has happened to answer to some demand of modern life, and is still accepted, in part or entirely, though on grounds quite new and different; and so it is in this case.

The plan which will here be suggested is this: Let us abolish the old privilege, and provide in its stead for a general freedom of questioning, establishing limits, however, in the shape of certain exceptions. (1.) On one such exception I suppose that all would be agreed, namely, that no incriminating question be allowed upon a point not material to the main issue. This exception would remove all opportunity to annoy or to disgrace by questions probing into secondary topics, and would confine the interrogations to the limits strictly necessary for the investigation of the matter in hand. (2.) If any further extension of the privilege were desired, it might be granted indiscriminately to all *witnesses* (other than the accused). That is, none but accused persons need answer criminal questions, and then only on points material to the issue. Some such safeguard might be thought necessary for preventing the witness-box from becoming a place of dread and dislike, and for guaranteeing the due supply of witnesses. I am inclined to think, however, that the first exception alone would satisfy the needs of justice. By putting the question of materiality in the hands of the presiding judge alone, without appeal, we should avoid the danger of adding to the volumes of reports and of protracting litigation, and should put ourselves in line with one of the great and needed reforms of the day.

Space prevents me from referring to other interesting aspects

of the privilege, where some remodelling might not be amiss. There is no reason why our profession should not begin now to move in this reform. Hallam calls this privilege "that generous maxim of English law," and can find no more to say in its favor. But this is one of the cases where we must be just before we are generous. Every day, in some court of some city, justice is mis-carrying because of this extraordinary maxim (nothing in truth, but a misquotation consecrated by age), "*nemo tenetur seipsum prodere*."

*John H. Wigmore.*

TOKIO, JAPAN, 1891.

# HARVARD LAW REVIEW.

---

Published monthly, during the Academic Year, by Harvard Law Students.

---

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

---

## *Editorial Board.*

OLIVER PRESCOTT, JR., . . . . .	<i>Editor-in-Chief.</i>
PHILIP S. ARBOT, <i>Treasurer,</i>	RICHMOND O. AULICK,
ALBERT S. BARD,	ALBERT E. HADLOCK,
EVAN H. HOPKINS,	CARLETON HUNNEMAN,
FREDERICK B. JACOBS,	M. DAY KIMBALL,
JAMES G. KING,	JAMES M. NEWELL,
WILLIAM F. PILLSBURY.	

---

THE INCREASING INFLUENCE OF THE LANGDELL CASE SYSTEM OF INSTRUCTION.—In the annual report of the President and Treasurer of Harvard College for 1889-90, Professor Langdell presents a statement of the growth of the Harvard Law School within twenty years. It is instructive to notice in this connection that there has been at the same time a great advance in the amount of appreciation accorded the method of instruction established about 1870 in this school, the essence of which was to substitute the discussion of the actual authorities of the law for the taking of results from text-books and lecture-notes. "The object of the case system is to compel the mind to work out the principles from the cases." This idea met with disfavor in many quarters at its introduction. A review of "Langdell's Selected Cases on Contracts" was published in the "Southern Law Review"<sup>1</sup> in 1879, containing these expressions of opinion: "We never could clearly appreciate why this collection (now for the first time issued in two volumes), and Professor Langdell's corresponding collection of "Cases on Sales," were published. . . . We suppose we must accept a reappearance of the second edition of this work without much change as an evidence that Professor Langdell's original views are still persisted in. There is just as much sense in endeavoring to instruct students in the principles of law by the exclusive reading of cases as there would be in endeavoring to instruct the students of the West Point Military Academy in the art of war by compelling them to read the official reports of all the leading battles which have been fought in the world's history. In our judgment, the chief value of the present work consists in the Summary which Professor Langdell has appended to the second volume. We cannot doubt that it is a valuable review of the matter presented in the cases. At a glance we can see that it performs one important office: it points out which of them are overruled!"

But already an effort had begun in England towards a scheme of education for law students which should be more helpful and more systematic

---

<sup>1</sup> 5 So. Law Rev. N. S. 872.

than the unworthy training then in vogue. In 1871, Professor Bryce and Professor Dicey came to the United States, and were most favorably impressed with the Columbia Law School; but when Professor Finch and Professor Pollock visited Harvard in 1885, both were greatly influenced by the Langdell method, which they saw in full operation. Professor Pollock writes in a letter addressed to O. W. Holmes, Jr., introductory to "The Law of Torts:" "Of Harvard and its Law School I will say only this, that I have endeavored to turn to practical account the lessons of what I saw and heard there, and that this present book is in some measure the outcome of that endeavor. It contains the substance of between two and three years' lectures in the Inns of Court, and nearly everything in it has been put into shape after or concurrently with free oral exposition and discussion of the leading cases." Professor Finch adopted the Langdell system in his lectures at Cambridge, and published "A Selection of Cases on the English Law of Contract," which met with this criticism in the "Law Quarterly Review:"<sup>1</sup> "The lawyer or student who really enters into the results of a line of leading cases learns much more than a few verbal maxims which may be committed to memory. He sees what is the true meaning of legal doctrines when applied to fact; he 'becomes,' as Mr. Finch well expresses it, 'familiar with the tone of thought, the attitude of mind, which prevail in our courts; he gets a touch of the genius of English law.' He learns, in short, by the only means by which it can be learned, the notion of justice which the lawyers and judges of England have developed by labors extending over centuries, and have impressed upon the minds of the English people." And in a note upon an article in the "American Law Register" of July, 1888, written by Mr. Sydney G. Fisher, of Philadelphia, to explain and defend the system of teaching practised in the Harvard Law School, the "Law Quarterly Review"<sup>2</sup> remarks again: "The system is a thoroughly sound and practical one. It has been to some extent adopted in other American law schools, and approximations to the method have been tried in this country in the Inns of Court and at Cambridge with very good effect, so far as a judgment can yet be formed. One of the first and greatest fallacies besetting law students is to suppose that law can be learned by reading *about* the authorities. Professor Langdell's method (for it should justly bear the name of its inventor) strikes at the root of this."

In yet another instance the aim to prepare students on narrow lines of work merely for actual law practice is condemned as inadequate, and the departure taken by Professor Langdell is acknowledged to be in the interest of legal scholarship in its highest sense. Although the reading of cases has not been disregarded, the manner of teaching law at Columbia has been mainly by means of lectures and the study of treatises. An enlarged conception of what the training of a law student should be has now led to the formation of a plan for a reorganized law school by the trustees of that university. The new methods of the Columbia school for the year 1891-92 are outlined in the formal announcement lately published, but they are not explained in detail. It is believed, however, that the practice which that school has followed ever since Professor Dwight became its head is now discarded, and that the Harvard system will serve as its model in the future.

<sup>1</sup> Law Quarterly Review, II. 88.

<sup>2</sup> Law Quarterly Review, V. 228.



**COMMON SCOLD. — DUCKING-STOOL.** — The recent New Jersey decision<sup>1</sup> that a common scold is indictable as a common nuisance at once arouses one's curiosity to know if the court sends her to the ducking-stool, — the common-law punishment for this common-law offence, — and to wonder, further, if the gag, the whipping-post, and the pillory are still common down there in New Jersey. Those instruments of punishment are certainly scarcely less civilized than this offence *communis rixatrix*,<sup>2</sup> which degrades woman to the condition of a mere thing, a nuisance, and is really a relic of a time when woman was a slave or servant, when witches and gypsies were hung, noses were cut off, and tongues were cut out for false rumors.

To be sure the offence was pretty generally recognized in the early days of the colonies, while in Virginia, and perhaps in other colonies as well, the ducking-stool was common as its punishment. In 1634, a man writing from Virginia to Governor Endicott of Massachusetts describes the ducking of a scold there which he has just witnessed, and then continues: "Methought such a reformer of great scolds might be in use in some parts of Massachusetts Bay, for I've been troubled many times by the clatter of y<sup>e</sup> scolding tongues of women y<sup>e</sup> like y<sup>e</sup> clatter of y<sup>e</sup> mill seldom cease from morning till night."<sup>3</sup> Whether the instrument was ever in use in Massachusetts is doubtful, although one was said to have been in existence in a small Massachusetts town not many years ago. In New York the ducking-stool was early decided against; and, much more than this, in the time of Governor Fletcher the rule against scolds in New York was very properly — if such a rule was to be maintained at all — extended to apply impartially to men and women alike.

Coming down to the present century, in a Pennsylvania case<sup>4</sup> so late as 1825, a woman was convicted of being a common scold and sentenced to be ducked three times; but the case going up to the higher court, the judge said such punishment had never prevailed in Pennsylvania, and he should not allow it; that while he admired the general structure of the common law as much as any one could, still, — as he expressed it, — "I am not so idolatrous a worshipper as to tie myself to the tail of this dung-cart of the common law." He further said he hesitated to decide the offence indictable even, but on this point he yielded to his brother judges.

That Pennsylvania decision was half a century ago, and while it seems to us surprising that even then a judge should have only "hesitated" to decide a scolding woman indictable as a common nuisance, yet at the present time it seems not only surprising but monstrous that we have not advanced far enough towards the equal rights of woman, but that she who scolds may be fined, imprisoned, or ducked, while the most scandalously abusing and railing man goes unpunished.

---

**JUSTICE — SALE OF CHURCH PROPERTY FOR DEBTS.** — The recent decision of the Georgia court<sup>5</sup> that a church site and edifice should be

<sup>1</sup> *Baker v. State*, 20 Atl. Rep. 858.

<sup>2</sup> IV. Black. Com. 169.

<sup>3</sup> Amer. Hist. Rec. 204.

<sup>4</sup> *Jones v. Com.*, 12 S. & R. 220.

<sup>5</sup> *Lyons v. Swings Bank*, 12 S. E. Rep. 882.

sold to pay the salary of the pastor is of interest to lawyers and ministers alike. So, too, is the little dissertation upon justice contained in the opinion of the court. After expressing the view that if any debt ought to be paid it is one contracted for the health of souls, and if any class of debtors ought to pay, the good people of a Christian church are of that class, the learned judge continues: "The study of justice for more than forty years has impressed me with the supreme importance of this grand and noble virtue. Some of the virtues are in the nature of moral luxuries, but this is an absolute necessity of social life. It is the hog and hominy, the bacon and beans, of morality, public and private. It is the exact virtue, being mathematical in its nature. Mercy, pity, charity, gratitude, magnanimity, etc., are the liberal virtues. They flourish partly in voluntary concessions made by the exact virtue, but they have no right to extort from it any unwilling concession. A man cannot give in charity, or from pity, hospitality, or magnanimity, the smallest part of what is necessary to enable him to satisfy the demands of justice. It is ignoble to indulge any of the liberal virtues by leaving undischarged any of these imperative demands against us. . . . We think a court may well constrain this church to do justice. In contemplation of law, justice is not only one of the cardinal virtues, it is the pontifical virtue."

---

## THE LAW SCHOOL.

---

### LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

CONTRIBUTORY NEGLIGENCE. — CAUSATION. — (*From Professor Smith's Lectures.*) — The expression "contributory" negligence is inaccurate and misleading. It suggests that a penalty attaches to a man's failure to exercise due care in his own behalf. Such, however, is by no means the case. No one owes to himself a duty of care, and a penalty can only attach where there has been a breach of duty. Further, negligence may be contributory in any one of several ways. 1. It may be contributory in the sense of being an element in the chain of antecedents of which the injury complained of is the consequent. 2. It may be contributory in the sense of operating simultaneously and concurrently with the defendant's negligence to produce the injury complained of. 3. It may be contributory in the sense of calling into actual existence the cause itself of the injury. It is in this last sense that it is generally used and understood in the law. But "causative" or "decisive" negligence would much better express the meaning of the doctrine. As Mr. Beven, in his work on Negligence, says, contributory negligence is really only a special application of the law of negligence. What he really means is, that contributory negligence is only a special application of the doctrine of causation. "The true ground of contributory negligence being a bar to recovery is that it is the proximate cause of the mischief" (Pollock on Torts, 2d

edition, 401). The doctrine of legal cause has itself been the subject of much discussion, and there is still some diversity of opinion on the question. There are, in general, to be found in the books three theories of causation. 1. The doctrine that the defendant is liable if the injury would not have happened but for his acts. This view, however, is clearly wrong. It involves a too extended liability, for it takes no account of any possible intervening responsible agent or efficient cause. 2. The doctrine that the defendant is liable only for such consequences as a reasonable man would have foreseen. This view is as much too narrow as the former was too broad. Where a man has been guilty of a wilful wrong act, he is liable for all the consequences which result from that act, whether he foresaw them or not. Liability attaches to a negligent act only when damage ensues. But when damage does ensue, the act itself becomes wrongful, and no good reason can be given why liability for damage should be limited to "reasonable and probable" consequences, and not be extended to *all* consequences which actually do result from the act without the intervention of any responsible agent or efficient cause. 3. The doctrine which attaches the liability to the last human wrongdoer in the chain of antecedents, and holds him responsible for all the consequences of his act, within the limits suggested by Mr. Bishop in his work on Non-Contract Law, where the act may so far have spent its force that it may no longer reasonably be considered as the responsible cause of any result. This last is the sounder view on principle. *In jure non remota causa sed proxima spectatur.*" What was the proximate cause, whether the act of the defendant was the proximate cause of the injury, are questions of fact to be settled by the jury, under proper instruction from the court. Apply this now to the question under consideration. In contributory negligence, the plaintiff's fault and the defendant's fault are both among the antecedents in the chain of causation. In general, no liability in tort attaches to mere "sins of omission," unless some prior act of the party, in creating a situation dangerous to others, has imposed upon him a duty of action. The plaintiff's fault, then, must either (1) precede, (2) be concurrent with, or (3) follow the defendant's wrongful act. If the plaintiff's fault preceded the defendant's wrongful act, then the defendant was the last responsible human wrongdoer, and the defendant is liable because his act was (and the plaintiff's was not) the responsible legal cause of the damage. If the plaintiff's wrongful act and the defendant's wrongful act are simultaneous and concurrent, the plaintiff cannot recover, because his own act is part of the responsible legal cause of the damage. If the plaintiff's wrongful act follows the defendant's wrongful act, then, as the plaintiff is the last responsible human wrongdoer, he will be barred from recovery; and this not because his wrongful act "contributed" with the defendant's act to produce the damage, but because his own act was the sole responsible legal cause of the damage. In order, however, to bar the plaintiff, his act must be both a responsible act—that is, one not induced by the previous wrongful act of the defendant—and also one tending to produce the injury complained of. This theory would seem to offer a simpler and more satisfactory solution of the vexed question of "contributory negligence" than do any of the other prevalent doctrines. If it be objected that this theory fails to meet the difficulty raised by "continuing negligence," it may be answered that no other theory meets the difficulty, while under this theory at least a partial solution may be offered. Where the plaintiff's negligence

is continuing at the time of the injury suffered, it is so in one of two ways. It is either concurrent with that of the defendant as an active cause in producing the result—in which case the plaintiff will be barred; or it is continuing in the sense of being a condition of the dangerous situation—in which case the defendant's act will be considered as the legal cause of the injury, and the plaintiff will not be barred. The negligence of the plaintiff does not absolve the defendant from his duty of care. In the language of Carpenter, J., in *Company v. Railroad*, 62 N. H. 164: "If due care on the part of either at the time of the injury would prevent it, the antecedent negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior misconduct. The latter is *incuria*, but not *incuria dans locum injuriæ*—it is the cause of the danger; the former is the cause of the injury." It is not claimed that this test—namely, fixing the liability on the last human wrong-doer—will reconcile all authorities, yet it is claimed that it will reconcile more than any other test suggested.

---

## RECENT CASES.

---

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the court. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

**AGENCY—EMPLOYER'S LIABILITY ACT—CONTRACT IN CONTRAVENTION OF.**—Code Ala. § 2590, subd. 5, makes an employer liable to an employee for personal injuries resulting from the negligence of any person in the employer's service, who has charge or control of any engine, car, or train upon a railroad. *Held*, that a provision in a contract between a railroad company and a switchman, whereby the regular wages paid the latter were to cover all risks and liability to accident from every cause, and the right to damages was not to be recognized, was "in contravention of the statutory provisions, opposed to public policy," and void. *Hissong v. Richmond & D. R. Co.*, 8 So. Rep. 776 (Ala.).

An opposite view of such a contract was taken in England, *Griffiths v. Earl of Dudley*, L. R. 9 Q. B. Div. 357. But see *Baddeley v. Earl of Granville*, L. R. 19 Q. B. Div. 423. In this country, in those States where it is not settled by statute, both views find support.

**AGENCY—INTOXICATING LIQUORS—SALE BY AGENT.**—One who unlawfully sells liquor, as clerk or agent for a wholesale liquor-dealer, without a license, may be convicted of carrying on the business of a wholesale liquor-dealer without a license, though he has no pecuniary interest other than as agent or clerk. *Abel v. State*, 8 So. Rep. 760 (Ala.).

**BILLS AND NOTES.**—One S obtained by fraud a United States postal money-order payable to A or order. He forged the indorsement of A upon it, and obtained payment from the post-office, in the form of a check payable to A or order, drawn by the United States upon the defendant bank. The post-office clerk was not negligent in paying S, as the latter had fraudulently contrived to get several reputable persons to identify him as A. S took the check to the defendant bank, indorsed it in the name of A, was identified by the same persons as before, and received payment. The United States, on discovery of the fraud, paid the amount of the order to A, and brought action against the bank for the money paid by it upon the check. *Held*, that the plaintiff could not

recover; that, if anything, the plaintiff was more in fault, as he had put it in the power of S to obtain the money; and that, apart from negligence, it was a case of equal equities, in which the loss must remain where it fell. *United States v. National Exchange Bank*, 45 Fed. Rep. 163.

The decision of this case is correct, but the grounds upon which it is placed are, with deference, hardly satisfactory. As the check was given by the drawer directly to S, the title to the obligation must have passed to S, just as the title to a chattel passes to a fraudulent purchaser. And S, having obtained the title by fraud, must also have acquired a right to indorse in the name by which he had been designated as payee by the drawer. The bank, therefore, having no notice of the fraud, and paying to S on his indorsement in the name of A, strictly complied with the order of the drawer, and could in no wise be responsible.

**BILLS AND NOTES — COLLATERAL AGREEMENT BETWEEN INDORSER AND INDORSEE.** — Action by indorsee against the indorser of a promissory note. The defence was failure to present the note for payment at maturity. Plaintiffs offered to prove at the trial that at the time of indorsement defendant verbally waived demand upon the makers at maturity, notice thereof, and of non-payment. *Held*, that evidence of such collateral agreement was not admissible. *Farwell et al. v. St. Paul Trust Co.*, 48 N. W. Rep. 326 (Minn.).

**CARRIERS — SHIPMENT AND DELIVERY OF LIVE-STOCK.** — A carrier of live-stock cannot make a valid agreement to receive and deliver all stock consigned to it exclusively at and through the stock-yards of another corporation, and to charge the shipper or consignee, for the benefit of such corporation, a certain sum for the use of its yards, in addition to charges for transportation. *Covington Stock-Yards Co. v. Keith*, 11 Sup. Ct. Rep. 461.

**CONSTITUTIONAL LAW — INTERSTATE COMMERCE.** — A statute of Kentucky imposes a license tax on peddlers, and makes voidable, as against a peddler failing to pay the license, all contracts of sale made by such peddler. *Held*, in action on a promissory note, that the statute applies to citizens of another State bringing goods into Kentucky to sell, and that, as so construed, it is not inconsistent with Art. I., sec. 8, or Art. IV., sec. 2, of the Constitution of the United States. *Rash v. Farley*, 15 S. W. Rep. 862 (Ky.).

**CONSTITUTIONAL LAW — INTERSTATE COMMERCE — LICENSING OF TUG-BOATS.** — Tug-boats employed in towing vessels engaged in interstate commerce into and through the harbor of Chicago and along the Chicago river, thereby assisting such vessels to begin and end their voyages to other States, are themselves engaged in interstate commerce. A city ordinance, prohibiting the use of such tug-boats, except under license from the city, is an unconstitutional interference with interstate commerce. *Harmon v. City of Chicago*, 26 N. E. Rep. 697 (Ill.).

**CONTRACTS — BREACH — RECOVERY OF CONSIDERATION.** — The plaintiff had leased to the defendant several printing-presses at a fixed sum, to be paid in monthly instalments, with an option of final purchase. The defendant gave several promissory notes as security for the payment of the several sums when due. The plaintiff having, in accordance with the terms of the lease, on the failure of one monthly payment taken possession of the presses, brought suit on the notes. *Held*, that the covenants were dependent, and the agreement having thus been rescinded, there could be no recovery on the notes for failure of consideration. *Campbell Printing Press and Manufacturing Co. v. Hickok*, 21 Atl. Rep. 362 (Pa.).

**CORPORATIONS — TELEGRAPH AND TELEPHONE.** — A telegraph company, organized under the telegraph act, may in the exercise of its proper powers under that act condemn land for the erection of a line of telephone. *State v. Central New Jersey Tel. Co.*, 21 Atl. Rep. 460 (N. J.).

**CORPORATIONS — ULTRA VIRES CONTRACT.** — A corporation chartered "for the transportation of passengers in railroad cars, constructed and to be owned by the said company," under certain patents, and empowered to enter into contracts with other corporations "for the leasing or hiring and transfer to them" of their cars and other personal property, leased for ninety-nine years to another corporation in the same business all its property, including its cars, patents, and all contracts with railroad companies for the hire of its cars, and agreed that while the lease was in force it would not engage in the business of manufacturing and using or hiring cars. *Held*, that the cor-

poration was *quasi* public, and the lease was void as *ultra vires*, and because it was an abandonment by the lessor of its duty to the public. *Central Transp. Co. v. Pullman's Palace Car Co.*, 11 Sup. Ct. Rep. 478.

**CRIMINAL LAW — CONTRACT FOR ALIEN LABOR.** — The defendant was indicted for having prepaid the transportation of aliens under contract to perform labor for him in the United States, contrary to 23 U. S. St. 333. *Held*, that the offence was not committed unless there was a valid contract with the aliens. *United States v. Edgar*, 45 Fed. Rep. 44.

**CRIMINAL LAW — MURDER — RESISTING UNLAWFUL ARREST.** — Homicide done in resisting an unlawful arrest will not be reduced to manslaughter because of that fact, unless accused was aware at the time that the arrest was unlawful. In the absence of such knowledge, there is no reason for assuming the existence of sudden passion, which the law regards as naturally provoked when interference with personal liberty is wrongful and known as such. *Drew's Case*, 4 Mass. 391, explained and qualified. *Ex parte Sherwood*, 15 S. W. Rep. 812 (Tex.).

**EQUITY — INJUNCTION — INTERSTATE COMMERCE.** — The complainants filed a bill for an injunction, alleging that they, as agents for dealers in another State, were engaged in selling liquor in original packages, and that by civil and criminal proceedings under the prohibitory law of the State, the defendants were seeking to break up and destroy complainant's business in violation of their rights under the Federal Constitution. There was no allegation that the defendants were insolvent, or were likely to do irreparable damage. *Held*, that the bill would not lie to restrain the criminal proceedings, as equity had no such power; that it would not lie to enjoin the civil proceedings, as there was an adequate remedy at law. *Hemsley v. Myers*, 45 Fed. Rep. 283. [Compare *Tuchman v. Welch*, 42 Fed. Rep. 548.]

**EQUITY — INJUNCTION — WRONGFUL ATTACHMENT.** — Where the property wrongfully attached is a stock of merchandise, which in connection with his business constitutes the whole of the owner's resources, he may have an injunction against closing his store and the sale of the goods, since trespass or replevin is not an adequate remedy, as damages are recoverable therein only for the value of the goods, and not for the destruction of his business. *North v. Peters*, 11 Sup. Ct. Rep. 346. This follows *Watson v. Sutherland*, 5 Wall. 74, 79.

**EQUITY — SALE OF CHURCH PROPERTY FOR DEBTS.** — A court may compel the sale of a church site and edifice to pay the salary of the pastor. *Lyons et al. v. Planters' Loan & Savings Bank*, 12 S. E. Rep. 882 (Ga.).

See *ante*, p. 91.

**EVIDENCE — ACCOUNT-BOOKS.** — Entries in the account-books of a corporation are not *per se* competent evidence on behalf of the corporation in an action against a director. Reversing 7 N. Y. Supp. 535. *Rudd v. Robinson*, 26 N. E. Rep. 1046 (N. Y.).

**MUNICIPAL CORPORATIONS — BUILDINGS FOR PRIVATE PURPOSES.** — Under a statute authorizing a city to appropriate public money for the erection of a hall to be used and maintained as a memorial to the soldiers and sailors of the War of the Rebellion, the city has no power to make an appropriation for the erection of a building to be used in part by a certain Grand Army Post during its existence as an organization, since that is not a public use. *Kingman et al. v. City of Brockton*, 26 N. E. Rep. 998 (Mass.).

**PARLIAMENTARY LAW — POWERS OF PRESIDING OFFICER.** — The mayor of the city of Little Rock is by statute president of the Common Council. Plaintiff, a member of that body, being somewhat disorderly but not violent, was given by the mayor into the hands of the executive officer and expelled. *Held*, in an action for assault and false imprisonment, that he could recover. A presiding officer, by usage and the common law, has no right of his own motion to put an offending member into custody unless actual violence is threatened. *Thompson v. Whipple et al.*, 15 S. W. Rep. 604 (Ark.).

**REAL PROPERTY — RULE IN SHELLEY'S CASE.** — A testator devised an estate to his son, "for and during the term of his natural life," and continued: "At the death of said son, I give and devise said lands in fee simple to the persons who would have inherited the same from the said son had he owned the same in fee simple at the time

of his death; but the provisions of this item shall vest in the said son only a life estate in said lands, and nothing more." *Held*, that the words describing those entitled after the son's death are words of purchase, and not of inheritance, and the rule in Shelley's Case does not apply, and the son took only a life estate. *Earnhart v. Earnhart*, 26 N. E. Rep. 895 (Ind.).

**REAL PROPERTY — STATUTE OF LIMITATIONS — INDEPENDENT ADVERSE HOLDINGS.** — In Alabama independent adverse holdings of land cannot be added to make up the statutory period and bar a recovery; but some privity must be shown between the adverse holders. *Lucy v. Tennessee & C. R. Co.*, 8 So. Rep. 806 (Ala.).

**STATUTE OF LIMITATION — CONVERSION — DEMAND AND REFUSAL.** — A lease belonging to the plaintiff was fraudulently taken from him by his son and deposited without his knowledge with B in 1881, as security for the repayment of money lent by B, who held the lease without knowledge of the fraud. B having become bankrupt, his trustee in 1889 assigned the debt to the defendant and handed the lease over to him. Subsequently the plaintiff demanded the lease of the defendant, and on his refusal to return it sued for detinue and conversion, to which the defendant pleaded the Statute of Limitations. *Held*, that the statute began to run from the time when the plaintiff first had a complete cause of action against the defendant, irrespective of the question whether he had a previous cause of action against B; that the statute, therefore, only began to run from the date of the demand and refusal, and was no answer to the action (following *Spackman v. Foster*, L. R. 11 Q. B. D. 99). The decision contained a dictum by Lord Esher that if one man is guilty of a wrongful conversion, and afterwards a second man converts the same thing, the cause of action against the second man is not barred by the statute, though the cause of action against the first man accrued more than six years before the second conversion; that the property in chattels is not changed by the Statute of Limitations, though more than six years has elapsed. *Miller v. Dell* [1891], 1 Q. B. 468 (Ct. of App.) (Eng.).

**WILLS — RIGHT OF JUDGMENT-CREDITOR OF THE HEIR TO CONTEST THE WILL OF TESTATOR.** — Testator, by his will, devised all his real estate to others than his only son and heir-at-law. Previous to testator's death one of the creditors of the son secured judgments against the son which became liens on all the real estate which the son had or might hereafter have. *Held*, that such judgment-creditor had a sufficient interest to entitle him to contest the validity of the will. *In re Langevin's Will*, 47 N. W. Rep. 1133 (Wis.).

**WILL — ADEMPMENT — PRESUMPTION AGAINST DOUBLE PORTIONS.** — Testator by his will bequeathed twenty-one twenty-fourth shares in a brewery business to his three sons as tenants in common. The eldest son, being employed as a manager in the business, pressed his father for an increase of salary. The father transferred to the eldest son two of the twenty-fourth shares in lieu of salary. *Held*, that in this case the presumption against double portions arose, and as that presumption had not been rebutted, the gift of the two shares must be treated as an ademption of the eldest son's one-third part, and he could therefore take only five of the remaining nineteen shares. *Re Lacom*, 64 L. T. Rep. n. s. 22 (Eng.).

## REVIEWS.

**A TREATISE ON THE LAW OF SALES OF PERSONAL PROPERTY, INCLUDING THE LAW OF CHATTEL MORTGAGES.** By Christopher G. Tiedeman, author of "Real Property," "Commercial Paper," etc. The F. H. Thomas Law Book Co. St. Louis, 1891. 8vo. Pages 769.

The author's purpose in publishing this new work on sales is, as he says in his preface, to supply a "comprehensive treatise of a distinctively American type." But in fact it is so comprehensive that it is more a digest than a treatise. Little space is given as a whole to the discus-

sion of principles. A vast number of cases are cited to support the text, and they are well arranged in connection with the propositions. The laborious research of the author in this direction is shown by the fact that his table of cases cited covers in itself one hundred and eighty-seven pages. The book will be of less value to students than to the profession. The great scope of the work, treating as it does on chattel mortgages, involuntary and judicial sales, auction sales, sales by agents and personal representatives, and the rights of *bona fide* purchasers, besides the usual matters, shows that there is no room for a thorough discussion of principles. It is distinctly a book for the profession, and fills a want that has for some time been growing more noticeable. It will not compete with the work of Benjamin, nor render that able treatise less necessary, when a careful examination of principles is required. It is rather an addition to the whole subject, and valuable because it throws light on the law of sales in this country.

D. T. D.

---

DOCUMENTS ILLUSTRATIVE OF THE CANADIAN CONSTITUTION. By William Houston, M.A. Carswell & Co. Toronto, 1891. 8vo. Pages 338.

This is a collection in one volume of the documents which contain the Constitution of the Dominion of Canada, and illustrate its historical development. If to reprint a number of these old Acts and Conventions, and accompany them with historical information and references in the form of notes, appears either no very difficult thing to do, or a thing of uncertain value when done, it must be said that the result is a book which a person who studies or teaches Canadian constitutional history cannot afford to neglect. French documents are given little place, for it is the editor's belief that one following the true line of development of the Canadian constitution is led back, not to the French *régime* in Canada, but to the colonial government of what is now the United States.

The needs of students of political and legal science in universities and law schools are held primarily in view in the scheme of this work; but it also presents facts which men who are not specialists, but who care for history, wish to have at command. Especially noteworthy groups of treaties are those relating to extradition and to the fisheries stipulations with France and the United States.

W. F. P.

---

WILLS AND INTESTATE SUCCESSION. By James Williams. London: Adam & Charles Black. 1891. Boston: Little, Brown, & Co. 12mo. pp. xii and 284. Cloth. Price \$1.50.

This little volume is the first of a series of similar text-books upon other branches of the law, to be edited by well-known members of the English bar. The aim is to present in a compendious form the history, development, and practical bearing of modern principles of law. As a neatly condensed summary of the law of wills and intestate succession, this little book will doubtless ably fulfill its mission. The space allotted to the work does not permit of that exhaustive treatment for which the practising lawyer naturally prefers the larger text-books; but as a handy little reference-book, it may be found useful even by the profession. It is intended, however, more particularly for students and laymen.

J. G. K.



**A TREATISE ON THE LAW OF ROADS AND STREETS.** By Byron K. Elliott and William F. Elliott. Indianapolis: The Bowen-Merrill Co., 1890. 8vo. pp. lxxvi and 742.

This work appears to fill very satisfactorily the growing want of a treatise on this special topic. It certainly will not lessen the favor which the authors won from the profession by their earlier book on "The Work of the Advocate." It is more than a mere digest of cases, as too many of our modern text-books are apt to be; there is a distinct effort to reduce the law on this subject to something like a well-ordered and scientific whole, in which inconsistencies are exposed and erroneous decisions boldly attacked. The references — nearly eight thousand cases are cited — are accurate and, to date, the topics are thoroughly indexed, and the mechanical execution of the book is better than the average. At the same time, the progressiveness of the subject probably will not allow the book, at least this edition, a very long lease of life. W. B.

---

**THE LAW OF EXPERT TESTIMONY.** By Henry Wade Rogers. Second edition, rewritten and enlarged. St. Louis, Mo.: Central Law Journal Co., 1891. pp. xlvii and 542.

President Rogers rendered a distinct service to the profession when, some years ago, he published the first edition of "The Law of Expert Testimony." This work supplements the general treatise on the law of evidence, and furnishes a convenient and useful book for the practising lawyer. The edition before us has been entirely rewritten and improved in many ways, particularly in arrangement, the citation of many recent cases, and the addition of a new chapter. In this chapter is collected the law on the much-discussed question of the weight to be given by the jury to the testimony of experts. The ease of getting, in the words of Mr. Justice Miller, "any amount of them on either side" is forcibly brought out; and the different views as to the proper instructions to be given to the jury are set forth and briefly discussed. This chapter is a valuable addition to the work. The book is well arranged, has good tables of contents and of cases cited, and an excellent index. The author states things clearly and compactly, and aims to give the law as it is in the different jurisdictions. He quotes freely, and usually with good judgment, from the opinions of many courts. One frequently regrets, however, that he has not stated the gist of the decision in his own words. In the few instances in which he has ventured to compare conflicting decisions and state his own opinion, he has made so distinct an addition to his book that it is to be regretted that he has not expressed his views much more freely.

J. A. B., JR.

## LEADING ARTICLES IN EXCHANGES.

---

**The Green Bag.** Vol. 3. Boston Book Co.

No. 4. Luther Martin [with portrait] (Eugene L. Didier). A Poem (Robert Grant). Portrait of an Ancient Lawyer. The Supreme Court of Missouri (L. C. Krauthoff). An Unseen Witness (Geo. B. Dexter). Overcrowding the Profession. Legal Incidents: VII., a Discomfited Witness.

No. 5. Rufus King [with portrait] (J. D. Cox). Memorial Day [in verse] (Wilbur Larremore). Sir Francis Bacon's Mother-in-Law (Alex Brown). Transmission of Criminal Traits. Supreme Court of Illinois (J. E. Babb). Front Row [in verse] (Irving Brown). Women and the Forum (Martha Strickland). The Maiden's Kiss.

**Albany Law Journal.** Vol. 43. Weed, Parsons, & Co., Albany.

No. 17. Notes of Cases.

**American Law Register.** Vol. 30. D. B. Canfield & Co., Phila.

No. 3. Summary Condemnation of Nuisances (J. B. Uhle).

**Central Law Journal.** Vol. 32. St. Louis, Mo.

No. 13. The Sharing of Profits as a Test of Partnership.

No. 14. Title to Lands under Fresh-water Lakes and Ponds.

No. 15. Territorial Jurisdiction of Criminal Offences.

No. 16. Continuity of Relation of Master and Servant.

No. 17. Defences to Municipal Aid Bonds.

**Current Comment.** Vol. 3. D. B. Canfield & Co., Phila.

No. 3. James Iredell (with portrait). The Dorr Revolution. Subterranean Waters. Restore the Goods. The Honeymoon.

No. 4. John Blair (with portrait). Lynch Law. The Honeymoon (continued). The New Procedure Act of Pennsylvania.

**Chicago Law Journal.** Vol. 2. N. S.

No. 3. Justice Miller. Limitations upon the Right to make Contracts.

**Law Journal.** Vol. 26.

No. 1316. Law Journal Reports. The Small Holdings Bill.

No. 1317. Is an Additional Judge Necessary? Loan or Partnership.

No. 1318. The Economy of Judicial Power. The Public Trustee Bill. (No. 2.)

**Irish Law Times and Solicitor's Journal.** Vol. 25. Dublin.

No. 1260. Apprenticeship to Incorporated Companies.

No. 1261. Parol Evidence as to Purpose of Letting under the Land Law Act, 1881.

No. 1262. Remuneration for investigating Title in Relation to further Mortgages.

No. 1263. The New Rules of Practice. No. 2.

No. 1264. The New Rules of Practice. No. 3.

**Canada Law Journal.** Vol. 27. J. E. Bryant Co., Toronto.

No. 5. The Division Courts System in Ontario.

No. 6. Unlicensed Conveyancers.

No. 7. Crown Council.

# HARVARD LAW REVIEW.

---

VOL. V.

OCTOBER 15, 1891.

No. 3.

---

## A BRIEF SURVEY OF EQUITY JURISDICTION.<sup>1</sup>

---

### VII.—CREDITORS' BILLS.

**I**N the preceding article the writer was compelled to confine himself strictly to the question, why Equity has jurisdiction over creditors' bills; and, therefore, nothing was said as to the consequences which have followed from the establishment of that jurisdiction. And yet those consequences are much more important, if not more interesting, than the mere fact of the existence of the jurisdiction or the reasons upon which it was founded. To those consequences, therefore, the reader's attention will be directed in the present article.

Prior to the establishment of the jurisdiction over creditors' bills equity had nothing to do with the administration of the estates of deceased persons. Now, the personal estates of all deceased persons are, in England, administered in equity; and the first stage in this great legal revolution was the establishment of the jurisdiction of equity over creditors' bills.

The administration of the personal estate of a deceased person consists first in collecting the debts due to the estate, and in converting the specific property, not specifically bequeathed, into money; secondly, in paying the debts due from the estate, in delivering the specific legacies, in paying the pecuniary legacies, and in paying the residue to the residuary legatee or next of kin, as the case may be. The doing of these various acts constitutes the duty of the executor.<sup>2</sup> If he does them voluntarily, and to

---

<sup>1</sup> Continued from Vol. IV. p. 127.

<sup>2</sup> As there are no material differences, for the purposes of this article, between an executor and an administrator, it will generally be assumed that the deceased person is a testator, and that his personal representative is an executor.

the satisfaction of all the persons interested in having them done. there will be no occasion for resorting to any court, and the estate will be administered out of court. If the executor fail to do his duty, or if a claim be made against the estate which the executor refuses to admit, or if the persons interested in the estate cannot agree as to their respective rights, a court must be applied to. Of course, the court must be one which has jurisdiction over the subject of the application, and the application must be made by a person who has the legal interest in the subject, *i.e.*, by a creditor, a legatee, or a next of kin of the deceased.<sup>1</sup> If the application is to be made by a creditor, originally a court of common law could alone be applied to; if by a legatee or next of kin, originally the proper ecclesiastical court could alone be applied to. As soon as equity assumed jurisdiction over creditors' bills, a creditor could, of course, apply to a court of common law or to a court of equity, at his option. But so long as the ecclesiastical courts could alone be resorted to by legatees and next of kin, equity could not fully administer the estate of any deceased person, unless it turned out to be insolvent, and so was wholly exhausted by creditors.

The next step taken by equity was to assume jurisdiction over bills by legatees and next of kin, and this it did soon after its jurisdiction over creditors' bills was established. Of the reasons why this was done, little need be said in this place.<sup>2</sup> Suffice it to observe that, in thus extending its jurisdiction, equity relied much upon the strong arm of the Court of Chancery (coupled with the weakness and unpopularity of the ecclesiastical courts) and little upon argument. Thus, on the 11th day of May, 1682, a plea to a bill by next of kin, that the jurisdiction was in the Ordinary, was overruled by Lord Chancellor Nottingham, no reason being reported;<sup>3</sup> and on the 6th of February following, in two cases, a demurrer to a similar bill met the same fate at the hands of Lord Keeper North, no other reason being given than "that

<sup>1</sup> Sometimes, as will be seen hereafter, the executor himself may file a bill in equity; but the bill is, in that case, in the nature of a bill of interpleader. See *infra*, pp. 126-7.

<sup>2</sup> Of course this is not the proper place to inquire into the jurisdiction of equity over bills by legatees and next of kin. Such bills are, however, so intimately connected with creditors' bills that it has been found impracticable to avoid speaking of them incidentally in the present article. Moreover, every administration bill, by whomsoever filed, necessarily results in the application of the estate, so far as is necessary, to the payment of the debts of the deceased.

<sup>3</sup> Pamplin v. Green, 2 Ch. Cas. 95.

the spiritual court in that case had but a lame jurisdiction."<sup>1</sup> As to the precise time when equity first assumed jurisdiction over bills by legatees, there seems to be an absence of evidence; but there is little room for doubt that it was at an earlier date than that just named. There was, indeed, a serious objection to the jurisdiction of equity over bills by next of kin, which had no existence in the case of bills by legatees; for it was argued (and not without force) that the Statute of Distributions,<sup>2</sup> on which the rights of next of kin are founded, vested exclusively in the Ordinary the jurisdiction of compelling payment of distributive shares.

The Court of Chancery was never content to share with the ecclesiastical courts any jurisdiction exercised by it, and, therefore, as often as it usurped the jurisdiction of the latter courts, it soon found the means of making its own jurisdiction exclusive; and so it was in the case now under consideration. The Court of Chancery ever lent a willing ear to the complaints of executors who were sued by legatees or next of kin in the ecclesiastical courts; and it did not hesitate to grant injunctions whenever it was dissatisfied with the mode in which justice was administered by the latter courts;<sup>3</sup> and even when a final sentence had been given in an ecclesiastical court, the Court of Chancery exercised the right of examining it; and, if it disapproved of it, it treated it as a nullity.<sup>4</sup> The jurisdiction of the ecclesiastical courts over legacies and distributive shares was, therefore, for all practical purposes, speedily destroyed, and for the last two hundred years equity has practically exercised an exclusive jurisdiction over those subjects, the jurisdiction of the ecclesiastical courts over the estates of persons deceased having, for the same length of time, been practically limited to taking the probate of wills, granting letters testamentary and of administration, and requiring the filing of inventories by executors and administrators.

Equity, having thus acquired concurrent jurisdiction (*i.e.*, con-

<sup>1</sup> *Matthews v. Newby*, 1 Vern. 133; *Howard v. Howard*, *id.* 134.

<sup>2</sup> 22 & 23 Car. II., c. 10 (1670). That the statute assumed that the ecclesiastical courts alone would have jurisdiction to enforce the rights created by it, was never doubted; and the only answer that was ever given to the argument founded on the statute was that the latter contained no negative words, *i.e.*, did not in terms exclude the jurisdiction of equity. See *Matthews v. Newby*, *supra*.

<sup>3</sup> *Vanbrough v. Cock*, 1 Ch. Cas. 200; *Horrell v. Waldron*, 1 Vern. 26; *Nicholas v. Nicholas*, Ch. Prec. 546; *Anon.*, 1 Atk. 491. But see *Basset v. Basset*, 3 Atk. 203.

<sup>4</sup> *Bissell v. Axtell*, 2 Vern. 47.

current with courts of common law) over the claims of creditors of deceased persons, and exclusive jurisdiction over the claims of legatees and next of kin, had jurisdiction to administer fully and completely the personal estate of any deceased person, when properly applied to for that purpose,—a jurisdiction which no one court had ever before possessed; and the best justification of the Court of Chancery in extending its jurisdiction to bills by legatees and next of kin will be found in the need there was that some one court should have jurisdiction to administer the estates of deceased persons in respect as well to the claims of creditors as to the claims of legatees and next of kin.

The acquisition of the necessary jurisdiction was, however, only the beginning of the task which equity had before it. The difficulty which it next encountered lay in the fact that it had no suitable machinery for administering the estates of deceased persons. The only (or rather the best) machinery that it had for the purpose was that furnished by an ordinary suit; but that was neither adequate nor suitable. The only thing at all analogous which equity had been called upon to do was to administer the estate of a bankrupt debtor; but that was done, not by a suit, but by a proceeding specially provided for the purpose by statute. If it be asked why it was not sufficient for any creditor, legatee, or next of kin, whose claim was not satisfied, to bring a suit against the executor to enforce such claim, it may be answered, first, that it did not lie in the mouth of equity, in view of its recent extension of its jurisdiction, to say that nothing further was necessary, as a creditor, legatee, or next of kin could always sue the executor, the former at common law, the two latter in the ecclesiastical courts; secondly, that no one suit by a creditor, legatee, or next of kin, against the executor, to enforce his individual claim, would enable equity to administer the estate, nor would any number of separate suits of that kind. On the contrary, such a mode of proceeding would have assumed that every estate of a deceased person was to be administered out of court, a court being applied to only when some individual claimant had some complaint to make against the executor. Thirdly, if an estate is to be administered by a court, it must be administered by some one suit or proceeding. The administration of an estate consists in dividing it among the several persons who have interests in it or claims upon it, according to their

respective rights; and, to enable a court so to divide an estate, it must ascertain, not only who such persons are, but what are their respective rights; and, in order to enable it to do the latter, it must have all such persons before it (or at least it must give them all an opportunity to come before it) together; and this latter object can be accomplished only by means of one suit or proceeding. In short, when a court undertakes to administer an estate, it must consider the claim of every particular person in connection with the claims of all other persons, and it cannot dispose of any one person's claim separately and by itself. Fourthly, equity was called upon to provide some means of administering the estates of deceased persons, as well to satisfy the demands of justice as to justify itself in assuming complete jurisdiction over such estates. That equity was called upon to do this in order to satisfy the demands of justice, in the case of all estates which were, or might prove to be, insolvent is plain; but in truth the need was not confined to such estates. An estate might, indeed, be so clearly solvent that the executor would be perfectly willing to pay all debts and all specific and pecuniary legacies; but an executor could scarcely ever be perfectly safe in paying over the residue without the authority of some court which had the power and the will to protect him, because he could never be sure that debts would not afterwards appear for which he would be liable.<sup>1</sup> Moreover, in cases where the residue is undisposed of by will, it is frequently uncertain who are the next of kin; and wherever that is the case, it must be ascertained and decided by adequate judicial authority who the next of kin are, before the executor or administrator can safely pay over the residue to any one.

The question then recurs, How could equity so mould the proceedings in an ordinary suit as to make the latter serve the purpose of administering the estate of a deceased person? Equity has done this, and has done it with at least a fair degree of success. In order to understand clearly how it has done it, it will be well to proceed by stages. Let us then first take the simplest case, namely, that of a bill by a residuary legatee against the executor for an account and payment of the residue. Such a bill requires the court to ascertain, first, the amount of the testator's

<sup>1</sup> *Norman v. Baldry*, 6 Sim 621 : 2 Williams, *Executors* (8th ed.), 1354. But see 22 & 23 Vict., c. 35, s. 29.

personal estate, secondly, the amount of his debts, and, thirdly, the amount given by his will in specific and pecuniary legacies, because it is only in this way that the residue to which the plaintiff is entitled can be ascertained. Accordingly, the first decree will direct a reference to a Master to take an account of the testator's personal estate, debts, and legacies. The first and last of these three items will involve no special difficulty; nor will the Master have any difficulty in taking an account of the debts, so far as they have come to the executor's knowledge; but that is not sufficient. There may be debts which have not come to the executor's knowledge; and, if there are, they must be provided for. Accordingly, the decree will direct the Master to publish advertisements for all creditors of the testator to come in before him and prove their debts, and to state in such advertisements the time within which they must so come in; and the decree will then declare that all creditors who fail to come in within the time so to be stated shall be deprived of any benefit from the decree.

The decree having been made, the reference before the Master will next be proceeded with. As creditors bring in their claims, it will be the duty of the executor to see that they are fully proved, and to resist them if he thinks them not well founded. When, however, the suit is by the person entitled to the residue, he will have the chief interest in resisting unfounded claims, and, therefore, the executor may leave to him the responsibility of deciding what claims shall be resisted, and what resistance shall be made to them. If there is any room for doubt as to the solvency of the estate, every creditor will also be more or less interested in reducing the amount of the debts as much as possible; and accordingly every creditor will be entitled to resist the claim of every other creditor.<sup>1</sup> If a claim be rejected, an opportunity will be given to the claimant, if he desire it, to bring an action or file a bill against the executor to establish his claim.<sup>2</sup> So if a claim be contested in apparent good faith and on reasonable grounds, though unsuccessfully, the claimant will generally be required to bring an action to establish it, if the contestant insists upon a trial at law.<sup>3</sup>

---

<sup>1</sup> While the executor may, in the Master's office, resist any claim which he thinks unfounded, he cannot prevent a claim's being resisted by others, because he thinks it just, the decree having deprived him of the power of waiving any legal defence. He cannot, therefore, waive the defence of the Statute of Limitations. *Shewen v. Vanderhorst*, 1 R. & M. 347.

<sup>2</sup> See *Lockhart v. Hardy*, 5 Beav. 395.

<sup>3</sup> See *Fladong v. Winter*, 19 Ves. 196.



When all the directions contained in the decree have been fully carried out, the Master will make his report to the court, and when this report has been confirmed, the executor will be required to pay into court whatever money belonging to the estate the report shows to be in his hands, *i.e.*, whatever money the executor is shown to have received, and is not shown to have paid out for some legitimate purpose, or to have lost without his fault. The court requires this of the executor upon the ground that he confessedly holds the money *en autre droit*, and that the plaintiff will be entitled to what remains of it after prior claims have been satisfied. Moreover, if the report shows that any part of the assets consists of debts due to the estate, and which have not yet been collected, or of specific property which has not yet been converted into money, the executor will be directed to collect such debts, and to convert such specific property into money, as speedily as it may conveniently be done, and to pay into court the money thus realized.<sup>1</sup>

Finally, when the estate has all been converted into money, and the money paid into court, and when all claims upon the estate, except claims for costs, have been adjusted, the cause will be set down for a further hearing, and a final decree will be made, directing the Master to tax the costs of all parties whose costs are to be paid out of the estate, and thereupon directing all claims upon the estate which have been established, including interest and costs, to be paid out of the money in court, and directing the residue of that money to be paid to the plaintiff.

Of course it may happen that some creditor of the testator has failed to come in before the Master and prove his debt. If such should be the case, what will be the rights of such creditor? At law, his rights will remain the same as if no bill in equity had ever been filed, and if the estate was sufficient to pay all creditors in full, he will still have a legal right to compel the executor to pay him; but equity will not permit him to enforce that right; and he can, therefore, avail himself only of such remedy as equity itself will give him, and equity will give him no remedy whatever against the executor.<sup>2</sup> If, however, he apply while the money still remains in court, he will be let in with the other creditors, and no other

<sup>1</sup> This is by virtue of the 45th General Order of Aug. 26, 1841. See Sanders, p. 886.

<sup>2</sup> Farrell v. Smith, 2 B. & B. 337.

penalty will be imposed upon him than the payment of such costs as have been occasioned by his coming in so late.<sup>1</sup> But if the money be paid out of court before his claim is presented, all that the court can do for him is to permit him to file a bill against the person or persons upon whom his debt would have fallen, if it had been paid, to compel him or them to pay his debt out of what he or they have received from the estate; and this it will generally permit him to do. But if the debt, in case it had been paid, would have fallen upon several persons, he will be permitted to recover only a *pro rata* share from each, and not the whole from any one.<sup>2</sup>

Here then is one instance in which equity completely administers the estate of a deceased person by means of an ordinary suit, and does so, as is believed, without introducing any anomaly, and without violating any of the principles of procedure. It is true that we have the spectacle of a suit, brought by A against B, being used as a means of satisfying a claim made by C against B, C being no party to the suit. Under ordinary circumstances, this would undoubtedly be inadmissible; but, under the peculiar circumstances of the case now under consideration, it seems to be open to no objection. A cannot object because the payment of C's claim is a necessary condition of his obtaining the relief which he seeks. B cannot object, as he is in no way prejudiced. If C's claim be not well founded, he will have a full opportunity to resist it; and if he cannot successfully resist it in A's suit, he may, as has been seen, provided he can raise a reasonable doubt of its validity, require C to bring an action against him to establish it. B cannot object to being called upon to pay a claim of C in a suit brought for the sole purpose of compelling payment of a claim of A, for he has nothing to do with paying either. He pays the money into court in any event; and he has no concern with what afterwards becomes of it.

Can C complain of being required to come in and prove his claim in A's suit, at the peril of the estate's being administered without regard to his claim? It seems not. He has the fullest facilities for establishing his claim, even to the extent of bringing an action for that purpose, if necessary. It is true that the estate

<sup>1</sup> *Lashley v. Hogg*, 11 Ves. 602; *Angell v. Haddon*, 1 Madd. 529; *Brown v. Lake*, 1 DeG. & Sm. 144.

<sup>2</sup> *Gillespie v. Alexander*, 3 Russ. 130; *Greig v. Somerville*, 1 R. & M. 338. Compare 1 *Davies v. Nicolson*, 2 DeG. & J. 693.

*may* be administered without his knowledge; but that is no more than might happen if the estate were administered by the executor out of court. The administration of an estate cannot be delayed forever, because all claims against it *may* not have been brought in; and if the executor wait a reasonable length of time, or as long as the law requires him to wait, and use all other reasonable precautions, or all such as the law requires, and then proceeds to distribute the estate, no claim of which he then had no knowledge can afterwards be enforced against him.<sup>1</sup>

Can it be said that it is inconsistent with the true principles of procedure, and, therefore, injurious to the public, to permit a suit, brought by A against B, to be used as a means of compelling payment of a claim of C against B? In the mode and under the circumstances now supposed, it seems not. It is to be observed that C's claim does not affect the suit at all until the latter gets into the Master's office. In the Master's office C's claim can cause no difficulty, as the proceedings there are independent of the other proceedings in the suit. The Master simply carries out the directions contained in the decree, and such directions are all that he need know of the suit. Nor is the reference to the Master caused by C's claim, as it would be necessary in any event. Of course C's claim will cause A some delay in the Master's office, but, for the reason before stated, A cannot complain of that inconvenience. Will C's claim cause any inconvenience in the subsequent proceedings in the cause? The only thing that will remain to be done, after the Master's report has been made and confirmed, will be for the court to make its final decree. Undoubtedly, it is a cardinal rule that the relief given in a suit must be confined to the parties to that suit, and generally it must be confined to the plaintiff or plaintiffs. Moreover, as a rule, when there are more plaintiffs than one in a suit, they must, for all the purposes of the suit, constitute a unit, as a court of equity will not give separate and independent relief to each of several plaintiffs; and yet, in the case now supposed, the court must, by its final decree, give separate and independent relief, as well to the plaintiff as to each of the persons who have established claims before the Master. The

---

<sup>1</sup> The proposition in the text was stated on the authority of *Chelsea Water Works Co. v. Cooper*, 1 Esp. 275; but it seems that it cannot, as a general proposition, be supported. See 2 Williams, *Executors* (8th ed.), 1354; *supra*, p. 105. But see 22 & 23 Vict., c. 35, s. 29.

court would, therefore, undoubtedly encounter very serious difficulties in making its final decree, were it not for one circumstance, namely, the payment of the assets into court. That, however, removes every difficulty; for, in consequence of it, the final decree becomes merely the direction of the court to its own officer as to the disposition of the money in court. In short, the case becomes simply one of paying money out of court.

The subject may be looked at in another light. Supposing the suit of A to be prosecuted to the end for A's sole benefit, what would be the consequence? Clearly, the estate would have to be administered to the extent of having it all converted into money, and the money paid into court; but there A's relief would have to stop until it could be ascertained what claims there were upon the assets superior to A's claim. How would this be done? One way would be for A to present a petition to the court, entitled in the cause of A against B, asking that the residue of the estate be ascertained and paid over to him. The court would then make an order of reference to a Master, containing directions precisely like those contained in the first decree, as stated above, except that the Master would not be required to take an account of the estate, that having been already done. The Master having made his report, and his report having been confirmed, the court would make an order for paying the money out of court in precisely the same terms as if it had been done in the final decree, as before stated. Thus, the same result would be arrived at as before, and by means of one suit, but in a mode much less direct and much more dilatory and expensive.

So much for an administration bill filed by a residuary legatee. If the bill be filed by the next of kin,<sup>1</sup> the residue not having been disposed of by will, the suit will differ in only one material point from a suit by a residuary legatee, namely, that the court must be satisfied that the plaintiff is next of kin, and the sole next of kin to the deceased. How shall the court be satisfied of this? The question broadly is, Who are the next of kin of the deceased? It is, therefore, like the question, Who are the creditors of the deceased? In the former case, too, as well as in the latter, the court must find for itself the answer to the question, as there will be no

---

<sup>1</sup> In order to avoid raising questions which are foreign to the main purposes of this article, it will be assumed that there is but one residuary legatee, and but one next of kin.

one before the court who will be interested in furnishing a true answer, or upon whom the consequences of an erroneous answer will fall. On the contrary, those consequences will fall upon persons not before the court, and who, therefore, will have no opportunity to be heard. Accordingly, the court will ascertain who are the next of kin of the deceased in the same manner that it ascertains who are his creditors, namely, by referring the cause to a Master, with directions to him to publish advertisements for the next of kin of the deceased to come before him within a time to be limited, and make out their kindred, the court declaring that those who do not so come in will be deprived of all benefit from the decree. When shall the reference for this purpose be made? One might suppose, at first sight, that it would be most convenient to embrace in one reference everything that is to be done by the Master. In truth, however, the question, who are the next of kin of the deceased, is, in its nature, a preliminary question, as upon the answer to it will depend all the subsequent proceedings in the cause. It has, therefore, been found convenient to make the inquiry as to the next of kin the subject of a separate and preliminary reference; and accordingly the first decree is confined to that object.<sup>1</sup> If the result of this reference is against the plaintiff, his bill will be dismissed; if in his favor, the suit will proceed in the same manner as a suit by a residuary legatee. Regularly, therefore, there are three decrees in a suit by a next of kin, while there are only two in a suit by a residuary legatee.

If the bill be filed by a pecuniary legatee for the recovery of his legacy, a somewhat different case will be presented. As the claim of a pecuniary legatee is for a definite sum of money, and as he has no interest in the estate beyond the amount of his legacy, he will not be entitled to an account of assets, if the executor will admit them to be sufficient to pay the plaintiff's legacy; but if the executor will not admit the assets to be sufficient for that purpose, he will be required to give an account; and, in that event, the first decree will be the same as upon a bill by a residuary legatee, *i.e.*, the Master will be required to take an account, not only of the personal estate of the testator, but also of his debts, and of his specific and pecuniary legacies. An account of the debts and specific legacies will be required for the same reason as upon a bill by a residuary legatee, namely, that

---

<sup>1</sup> See Seton on Decrees (1st ed.), p. 72.

debts and specific legacies have a priority over pecuniary legacies. An account of the pecuniary legacies will be required because all such legacies are payable *pro rata*, and no one pecuniary legatee is allowed to gain a priority over others by suing for his legacy; and, therefore, the court must have an account of the pecuniary legacies, as well as of the personal estate, the debts, and the specific legacies, before it can know whether or not the plaintiff's legacy is to be paid in full, and, if not, then what proportion of it is to be paid.

Not only will the first decree be the same, in the case now supposed, as upon a bill by a residuary legatee, but all the subsequent proceedings will be the same, with one exception, namely, that, as the party or parties entitled to the residue will not be before the court, such residue will remain in court until such party or parties obtain payment of it by a petition to the court for that purpose.<sup>1</sup> It may be asked, indeed, how it is that the residue can be required to be paid into court, as the parties entitled to it are not before the court; and there is some technical difficulty upon that point. Still, as the decree is made for the benefit of all parties interested in the estate, except those entitled to the residue, and as the amount of the residue, if any, cannot be ascertained until the end of the suit, and as the payment of the whole fund into court must, in legal contemplation, be for the benefit of all parties interested in it, and cannot injure the executor, the technical difficulty has been disregarded.<sup>2</sup>

It must be observed, however, that no one can be bound by an accounting to which he was not a party, and, therefore, in the case now supposed, the party or parties entitled to the residue may require the executor to account over again upon a bill filed against him for that purpose; but of course it will be at the peril of costs, if they harass the executor with a second accounting without cause.

If the executor admit that he has sufficient assets to pay the plaintiff's legacy in full, the plaintiff will be entitled to no account, as he will need none; for he will be entitled to an immediate decree against the executor personally for the amount of his

---

<sup>1</sup> The question, whether a bill by a pecuniary legatee can be so framed as to enable the court to pay out the entire assets under the final decree in the suit, will be considered further on. See *infra*, p. 128 *et seqq.*

<sup>2</sup> See *infra*, p. 128 *et seqq.*

legacy. But it should be carefully observed that such a decree will afford the executor no protection against either a creditor or any other pecuniary legatee; for the executor had no right to make such an admission, unless he had sufficient assets not only to pay all debts, but also to pay all pecuniary legacies in full. In short, an admission of assets by an executor, upon a bill by a pecuniary legatee, means that the assets will be sufficient, after payment of all debts, and all specific legacies, if any, to pay all pecuniary legacies in full.

It will be seen, therefore, that, upon a bill by a pecuniary legatee against an executor, the testator's estate will or will not be administered, according as the executor is or is not required to give an account; and that he will be required to give an account unless he admits assets, while if he admits assets, he will not.

We now come to the case of a bill by a creditor against the executor to recover his debt; and the question is, whether such a bill can be so moulded as to serve the purpose of administering the estate. At first sight, it may seem that such a bill does not differ materially from a bill by a pecuniary legatee to recover his legacy. In truth, however, there is a very important difference between the two,—a difference, too, which is decisive of the present question.<sup>1</sup> All pecuniary legatees must, as we have just seen, be paid ratably, and no one of them can gain a priority over the others by suing for his legacy; but this is not true of creditors,—not even of those who are of the same degree. On the contrary, it is not only legally possible for any creditor of a deceased debtor to gain a priority by superior diligence over every other creditor of the same degree, but such is the inevitable consequence of any creditor's first recovering either a judgment at law or a decree in equity for his debt. That such is the law is perfectly well known; but it is doubtful if the reason of it is very well understood. In particular, it is believed that judgments against an executor are often confounded with judgments against his testator. It is true that a judgment of either class gives to the person who recovers it a right to priority of payment by the executor; but the reason is entirely different, according as the judgment belongs to the one class or the other. A judgment against a living debtor gives no priority to the creditor, except so

---

<sup>1</sup> *I.e.*, assuming that the bill is solely for the recovery of the plaintiff's debt. See *infra*, pp. 115-16.

far as the judgment is a lien upon the debtor's land;<sup>1</sup> but the moment the debtor dies, his judgment creditors are entitled, at common law, to be paid out of his personal estate in priority to other creditors; and the reason is that, when a debtor dies the common law ranks his creditors according to the nature of their debts, debts created by matter of record being the highest, and simple contract debts being the lowest. Judgment creditors, therefore, of a deceased debtor have a priority, not because they have obtained judgments for their debts, but because their debts are debts of record. The ranking of the creditors of a deceased debtor depends, however, entirely upon the nature of their debts at the moment of their debtor's death. Indeed, their nature cannot afterwards be changed without a destruction of them; and if, therefore, the executor of a deceased debtor converts a debt due by the latter into a debt of a higher nature, he thereby destroys it, and the new debt becomes his own.

How is it, then, that a judgment against an executor always gives the creditor a priority? The answer has just been suggested, namely, the judgment binds the executor personally. Moreover, an executor cannot prevent the recovery of a judgment against him, if he has sufficient assets to pay the debt, after paying debts of a higher nature; and, as the law compels him to pay a judgment so recovered, even if he pays it out of his own pocket, of course it must protect him, to that extent, against the claim of any other creditor, the existence of whose debt would not have prevented the recovery of the judgment, *i.e.*, against the claim of every other creditor whose debt, before the recovery of the judgment, was not of a higher nature than that of the judgment creditor. It is true that, in form, a judgment against an executor is commonly, in the first instance, *de bonis testatoris*, — not *de bonis propriis*; but, as every judgment against an executor *de bonis testatoris* is conclusive proof that the executor has sufficient goods of the testator to satisfy the judgment, the judgment is in effect *de bonis propriis*.<sup>2</sup>

---

<sup>1</sup> If an execution is issued on the judgment, the creditor may also acquire a lien on personal property of the debtor, but not otherwise. See *Finch v. Winchelsea*, 3 P. Wms. 399, note. See also 1 Archbold's Practice (13th ed.), 522.

<sup>2</sup> What is said in the text suggests another important distinction between judgments against an executor and judgments against his testator, namely, that the former have priority according to their respective dates, while the latter all stand upon the same footing.



The effect of a decree in equity against an executor, at the suit of a creditor of his testator, in giving the creditor a priority, is even more decisive than that of a judgment at law; for a decree in equity binds the executor personally in form as well as in effect. The executor, as in the case of a bill by a pecuniary legatee, is required either to admit assets or to give an account. If he admit assets (and an admission of assets in this case means only that he has sufficient assets to pay the plaintiff, after paying all debts of a higher nature), the creditor will be entitled to an immediate decree against the executor personally. If the executor decline to admit assets, he will be required to give an account; but the account will be exclusively for the plaintiff's benefit, its object being merely to enable him to show that there are sufficient assets to pay him, after paying all debts of a higher nature. If the plaintiff succeed in showing this, he will be entitled, as before, to a decree against the executor personally. Indeed, equity was bound in self-defence to make its decrees against executors binding on them personally; for otherwise such decrees would have had no other effect than to prove the existence of the debt (as to which there is commonly no question), and hence creditors who sued in equity would have been put at a great disadvantage as compared with creditors who sued at law.

It may be thought that, upon a bill by a creditor, if the executor does not admit assets, there ought to be an account of all debts of a higher nature than the plaintiff's, and that the payment of all such debts ought to be provided for in priority to the plaintiff's; and equity might, indeed, have taken that course, but in fact it has not. On the contrary, equity has in that respect followed the analogy of an action at law, treating all debts of a higher nature as if they had in fact been paid, and so permitting the executor to show them in his account as items of discharge.<sup>1</sup> One reason for this may have been that equity did not think it worth its while to go out of its way to provide for the payment of a part only of the debts. Another reason may have been that equity regards the claims of all creditors as equal in point of justice, and therefore it was not disposed to go out of its way to assist one class of creditors, upon the ground that they had a priority over other creditors.

It follows, therefore, that a bill by a creditor to recover his own

---

<sup>1</sup> See *Anon.*, 3 Atk 572.

debt never involved providing for the payment of (and therefore never involved taking an account of) any other debts; and a creditor who filed such a bill had a right to insist that his suit should not be incumbered or delayed by the claims of any other creditors with which he had nothing to do; and for the court to have made such a suit the means of providing for the claims of other creditors, without the plaintiff's consent, would have been an act wholly arbitrary, and in plain violation of the plaintiff's rights. Nor would it probably have been thought a boon to the body of the creditors of the testator to be permitted to come in and prove their debts under a decree obtained by one of such creditors, if that one creditor must be paid in full before the others were provided for at all.

The conclusion, therefore, is that, upon a creditor's bill against an executor, the estate of the testator can never be administered without the plaintiff's consent. With his consent, however, it clearly may be done; for his rights are the only obstacle which stands in the way. If, therefore, a creditor files a bill, expressly disclaiming any priority over other creditors of the same degree, and praying that payment of all the debts may be provided for, according to their legal priorities at the time of the testator's death, there is every reason why the prayer of the bill should be granted; for it enables the court to administer the estate, and it is also promotive of one of the most cherished objects of equity, namely, equality among creditors. Moreover, this is precisely what takes place in the common case where a creditor files a bill against an executor, "on behalf of himself and of all the other creditors of the testator," the words quoted being held (and properly held) to mean all that is stated above. Accordingly, upon such a bill, the first decree will direct an account of the estate and of all the debts of the testator, and when the account has been taken, payment into court of the balance in the executor's hands will be directed, as upon a bill by a residuary legatee, and the court will proceed in all particulars as upon a bill by a residuary legatee, except that no account of legacies will be taken, nor any payment of them provided for; but the residue of the personal estate, after payment of the debts, will remain in court until paid out on the application of those entitled to it.<sup>1</sup>

The words which have been quoted in the last paragraph have

---

<sup>1</sup> See *Collinson v. Ballard*, 2 *Hare*, 119.

an effect even beyond what has been stated; for they convert the bill from a bill seeking a personal decree against the executor into a bill merely for the administration of a fund. It is clearly impossible upon such a bill for any one but the plaintiff to have a personal decree against the executor; and it is as clearly impossible to give the plaintiff any relief which cannot also be given to all the other creditors. Accordingly, upon a creditor's bill, filed on behalf of the plaintiff and all the other creditors of the testator, no personal decree is ever made against the executor; nor, indeed, is any final decree whatever made against him, the estate being fully administered as to him when it has been converted into money, and the money paid into court. Moreover, as the bill seeks, not a personal decree, but the administration of a fund, there is no propriety in the executor's admitting assets (the only object of which is to lay the foundation for a personal decree); and still less will an admission of assets by the executor exempt him from giving an account. He is not, therefore, given the option of accounting or admitting assets, but he is required to account unconditionally.<sup>1</sup>

Of course the technical objection to requiring an executor to pay all the money in his hands into court, upon a bill by a pecuniary legatee, holds still more strongly in the case of a bill by a creditor on behalf of himself and all the other creditors; but it has been disregarded in the latter case as well as in the former.<sup>2</sup>

As a creditor may file a bill on behalf of himself and all the other creditors, so a pecuniary legatee may file a bill on behalf of himself and all other pecuniary legatees. As, however, a bill by a pecuniary legatee involves the administration of the estate equally, whether it be filed for the plaintiff's exclusive benefit, or "on behalf of the plaintiff and all the other pecuniary legatees," unless, in the former case, the executor admits assets, the only effect of the words quoted is to convert the bill from a bill seeking a personal decree against the executor into a bill for the adminis-

---

<sup>1</sup> It follows, therefore, that a creditor should never leave it in doubt whether his bill is for his own exclusive benefit, or on behalf of himself and other creditors. See *Reeve v. Goodwin*, 10 Jur. 1050. In *Woodgate v. Field*, 2 Hare, 211, where the bill was by a creditor, on behalf of himself and other creditors, there was not only an admission of assets in the defendant's answer, but, on that admission, the plaintiff was permitted at the hearing to take a personal decree against the defendant. It seems, however, impossible to support the decision.

<sup>2</sup> See *infra*, p. 128 *et seqq.*

tration of the fund, and thus to require the executor to account absolutely, instead of giving him the option of admitting assets or accounting.

The next question is, How could creditors be induced to share equally with other creditors the fruits of a suit prosecuted by themselves alone? That they were so induced is clear; for bills by creditors, except on behalf of themselves and all other creditors, are, and have long been, very uncommon. Undoubtedly, equity might originally have made it a condition of its entertaining a suit by a creditor, that other creditors should be permitted to share in its benefits; for equity may always dictate the terms on which it will give to the owners of legal rights the benefit of equitable remedies. Perhaps, however, the absolute right of a creditor to sue in equity was too well established to be drawn in question before it was perceived that such a condition was desirable. Perhaps, also, the imposing of such a condition, while the jurisdiction was new, would have had little other effect than to discourage creditors from coming into equity. At all events, equity never imposed any such condition;<sup>1</sup> and at length it became too late to do so. It became necessary, therefore, to find some other means of accomplishing the same object; and other effective means were at length found.

Of course the fact that one creditor of a testator sues the executor of the latter, does not prevent any other creditor from suing him also; and the fact that one creditor sues him for his own exclusive benefit does not prevent another creditor from suing him on behalf of all the creditors. Moreover, if one creditor file a bill for his own exclusive benefit, and then another creditor file a bill on behalf of all the creditors, and the creditor in the second suit obtain a decree for an accounting before the creditor in the first suit obtains a personal decree against the executor, the proceedings in the first suit will be stayed, and the creditor in that suit will have to come in and prove his debt under the decree in the second suit; for it is a rule, the reason of which will be considered presently, that, after a decree is made under which an estate can be administered, no one who is entitled to come in under that decree will be permitted to prosecute any suit for his own exclusive benefit. Moreover, executors were encouraged to cooperate with any creditor who sued on behalf of all the creditors, and thus enable him to obtain a

---

<sup>1</sup> See *infra*, p. 132, n. 2.

decree before any creditor who sued for his own exclusive benefit could gain a right to a priority of payment; and this was finally carried to such a length that an executor was permitted to commit the absurdity of suing himself, *i.e.*, of filing a bill against himself in the name of a creditor (whose consent, of course, he must obtain), the same attorney confessedly acting for both plaintiff and defendant.<sup>1</sup> If, however, it was suspected that an executor was using this privilege as a means of delaying creditors and keeping the money in his own hands, it was open to any creditor to make an application to the court to have the prosecution of the suit committed to himself or to some other creditor, and such an application was always listened to with favor.<sup>2</sup>

An executor, however, who honestly desired to prevent any one creditor from gaining a priority over others by obtaining a personal decree against himself, could easily do so in the manner pointed out in the last paragraph;<sup>3</sup> and, therefore, a creditor who sued an executor for his own exclusive benefit was confronted with the moral certainty, not only of failing in his object, but also of losing the benefit of conducting a suit for the administration of the estate. It is not surprising, therefore, that bills for the exclusive benefit of the creditor who filed them were superseded by bills for the equal benefit of all the creditors.

It must not, however, be supposed that all the obstacles which equity encountered in its attempts to administer the estates of deceased persons had yet been overcome. It had, indeed, been shown that suits by creditors of a testator could be so framed as to serve the purpose of administering the testator's estate, and means had been found of compelling creditors so to frame their suits; and, incidentally, means had been found of defeating the attempts of particular creditors, by suits in equity for their own exclusive benefit, to gain priority over other creditors of the same degree. But it was still possible for one creditor to gain priority

<sup>1</sup> *Paxton v. Douglas*, 8 Ves. 520, 522, *per* Lord Eldon; *Gilpin v. Lady Southampton*, 18 Ves. 469-470, *per* Lord Eldon.

<sup>2</sup> *Paxton v. Douglas*, 8 Ves. 520, 521-2, *per* Lord Eldon; *Sims v. Ridge*, 3 Mer. 458; *Powell v. Wallworth*, 2 Madd. 183; *Hawkes v. Barrett*, 5 Madd. 17. See also *Spode v. Smith*, 3 Russ. 511.

<sup>3</sup> In *Hayward v. Constable*, 2 Y. & Coll. 43, it appeared that an administration bill was filed Feb. 8, that the executor's answer was filed Feb. 11, and a decree made Feb. 12. In *Hawkes v. Barrett*, 5 Madd. 17, a bill was filed Dec. 15, the executors answered immediately, and a decree was made Dec. 22. One of the executors also was solicitor for both plaintiff and defendants, and the other executor was residuary legatee.

over others by obtaining a judgment at law against the executor; and, unless some means could be found of preventing that, no creditor would find it worth his while to file a bill in equity on behalf of himself and all the other creditors for the administration of the estate, and every insolvent estate of a deceased debtor would be exhausted in a ruinous struggle among the creditors for priority, or at best every executor whose testator's estate was insolvent would be forced to give a preference to those creditors whom he most favored by either paying them in full (so long as he had assets for the purpose), or by confessing judgments in their favor. In short, it was in vain for equity to prevent any one creditor from gaining a priority over the others in equity, unless he could also be prevented from doing the same thing at law. Could a creditor be so prevented? Clearly, only in one way, namely, by an injunction. Could, then, any principle be found upon which an injunction could be granted against a creditor who was seeking to recover his debt by an action at law? An injunction was granted in such a case for the first time in *Morrice v. The Bank of England*;<sup>1</sup> but it was upon a ground so special and so narrow that the decision left the jurisdiction of equity over the estates of deceased persons about where it found it. An executrix was there sued at law by many creditors of her testator after certain other creditors (whose debts were due only in equity) had obtained decrees against her in equity, in suits prosecuted for their own exclusive benefit; and, on a bill filed by her, an injunction was granted against the prosecution of the actions at law; but it was only upon the ground that the executrix was there placed between two fires. On the one hand no judgments which could be recovered against the executrix would protect her against the decrees, because the latter were made first, and equity could not possibly permit its decrees to be disobeyed because of what some other court had done since those decrees were made.<sup>2</sup>

---

<sup>1</sup> *Cas. z. Talbot*, 217, 3 *Swanst.* 573, 2 *Bro. P. C.* (Toml. ed.) 465.

<sup>2</sup> *Morrice v. Bank of England* was decided successively in the plaintiff's favor by Sir Joseph Jekyll, M. R. (before whom it was argued for six days), by Lord Chancellor Talbot (before whom it was argued for seven days), and by the House of Lords (before which it was argued for six days); and it may, therefore, be thought presumptuous to criticise the decision. The writer has, however, found himself wholly unable to support it. The difficulty is, that the facts do not bring the case within the reasons given for the decision, — a difficulty which does not appear to have been at all adverted to, either by counsel or by courts. The decrees did not bind the executrix personally, and were not intended to do so. A personal decree against an executor must be based either upon

On the other hand, the decrees would be no protection to the executrix at law, because, in the judgment of a court of law, a decree in equity is nothing. In short, equity must insist upon obedience to its decrees; and, therefore, as the executrix could not render such obedience without incurring liability at law, equity must protect her against such liability. The decision, however, did not warrant an injunction until a creditor had obtained a personal decree against the executor in equity, and, therefore, not until a creditor had accomplished in equity the very purpose which it was the object of an injunction to prevent a creditor's accomplishing at law; and that is the reason why the decision exerted so little influence over the administration of assets in equity.

It was not, however, the fault of the court that the decision in *Morrice v. The Bank of England* was placed upon so narrow a ground; for it has never been claimed that a suit in equity by a creditor, prosecuted for the plaintiff's exclusive benefit, could furnish any broader ground for an injunction. It is otherwise, however, of a suit in equity which is so framed that it will result in

---

an admission of assets by him, or upon an accounting which shows the amount of assets in his hands; but in *Morrice v. Bank of England* the executrix had neither admitted assets nor accounted. In her answer she had expressly declined to admit assets; and, though an account of the personal estate was directed by the decree, it had not yet been taken. If, therefore, the decrees had been so framed as to bind the executrix personally, they would not have been final (and, therefore, would not have bound her personally) until the account was taken, as it would not be known till then for what amount the executrix would be bound. The decrees were not, however, so framed. On the contrary, they simply directed the executrix to pay the plaintiff's claims out of the assets in her hands, and in a due course of administration. Although, therefore, the decrees were final, they did not bind the executrix personally. In truth, they had no other effect than to establish the plaintiff's claims and fix their amount. The plaintiffs seem to have supposed that any final decree would give them a priority, thus confounding judgments and decrees against executors with judgments and decrees against living debtors. The latter, of course, always bind the defendant personally; and, therefore, all that is necessary to give them full and complete effect is that they be final. *Smith v. Haskins Stiles Eyles*, 2 Atk 385. But, as to judgments and decrees against executors, the question is not whether they are final (though they must indeed be final), but whether they require the executor to pay absolutely or only out of assets. The case of *Abbis v. Winter*, 3 Swanst. 578, note, seems to show that the reason why a judgment or decree against an executor gives priority to the creditor who obtains it was not very well understood at the time when *Morrice v. Bank of England* was decided. In *Smith v. Birch*, 3 Beav. 10, the decree was neither binding on the executor personally, nor final. See also *Ashley v. Pocock*, 3 Atk. 208; *Gaunt v. Taylor*, 3 M. & Gr. 886; *Dollond v. Johnson*, 2 Sm. & Giff. 301; *Jennings v. Rigby*, 33 Beav. 198; *Williams v. Williams*, L. R. 15 Eq. 270; *Hanson v. Stubbs*, 8 Ch. D. 154.

the administration of the entire estate; for the first decree in such a suit is in effect a declaration that the court takes possession of the entire estate for the purpose of administering it; and, therefore, no other court can be permitted to enforce any claim against it. The moment that such a decree is made, the executor becomes amenable to the court which makes the decree, in respect to all his official acts; and hence that court will not thereafter permit any of the executor's official acts to be either directed or questioned by any other court. Such a decree has in fact the same effect, in giving the court exclusive jurisdiction over the estate, that the appointment of a receiver would have. It does not, indeed, and cannot, convert the executor into a receiver. The executor's legal rights and legal duties remain unchanged, and the exercise of the one and the performance of the other are interfered with only so far as the purposes of justice require. Accordingly, the executor is left for the most part to convert the estate into money, without interference; but when the estate has been converted into money, the court reserves to itself the disposition of that money, and, therefore, the executor is required, as has been seen, to pay it into court, and if he pays any of it out in the discharge of the testator's debts or legacies, he will do so at his peril, as the court will give him no other protection than to permit him to stand in the place of those whom he has paid.<sup>1</sup>

The conclusion therefore is, that as soon as a decree is made against an executor, under which the entire estate of his testator will be administered, or (in other words) under which the executor will be required to pay the proceeds of the whole estate into court, an injunction ought to be granted against the enforcement of any claim against the estate by an action at law; and accordingly such has been the established rule for more than a hundred years. An injunction was granted, under such circumstances, for the first time, by Lord Camden, in 1767, in the case of *Douglas v. Clay*; <sup>2</sup> but the reasons of the decision have not been reported, and the injunction may have been granted on a special ground; for the executor was there sued at law by the very persons who had obtained the decree in equity against him, and who may, therefore, have been held to have made their election between law and equity. The

<sup>1</sup> *Jones v. Jukes*, 2 Ves. Jun. 518; *Mitchelson v. Piper*, 8 Sim. 64; *Irby v. Irby*, 24 Beav. 525.

<sup>2</sup> Cited in *Brooks v. Reynolds*, 1 Bro. C. C. 183, 184; s. c. Dick. 393.



first injunction that was granted expressly upon the ground above explained was that granted by Lord Thurlow, in 1782, in the case of *Brooks v. Reynolds*; <sup>1</sup> and though it is doubtful whether that was a case in which the estate could properly be administered, yet a decree for the administration of the estate had in fact been made, and the correctness of that decree could not of course be questioned in a collateral proceeding. The decision in *Brooks v. Reynolds* was not, however, sufficient to settle the question; for in the subsequent case of *Kenyon v. Worthington*, <sup>2</sup> in which the question arose nakedly and upon its merits, an application to Lord Thurlow for an injunction was resisted by counsel of the greatest eminence. The resistance, however, was unsuccessful, and the injunction was granted. This was in 1786; and from that time the question was regarded as settled. <sup>3</sup>

The practice thus established involved from the beginning one danger (already adverted to in another connection), namely, that executors would sometimes make it a means of delaying creditors, and of keeping the assets in their own hands. This danger was, however, effectively guarded against by making it a condition of granting an injunction, that the executor make an affidavit as to the state of the assets, and pay into court whatever money was then in his hands. <sup>4</sup>

There was also a serious objection, in point of procedure, to the practice established by Lord Thurlow, namely, that it was expensive and cumbersome; for it made it necessary for every executor

<sup>1</sup> 1 Bro. C. C. 183, Dick. 603. That was a bill by an executrix to restrain a creditor of her testator from suing her at law. An administration decree had been made against the executrix, upon a bill filed by trustees under the testator's will. Possibly the decree was right, as the trustees were residuary legatees; and Lord Eldon (in *Perry v. Phelps*, 10 Ves. 34, 39) speaks of the bill as having been filed by residuary legatees. Still, the trustees filed the bill professedly to obtain the directions and indemnity of the court in executing the trust, and all the *cestui que trusts* under the will, as well as the executrix and the testator's heir at law, were made defendants; and, therefore, the bill seems to have been in the nature of a bill of interpleader. Dickens says (doubtless by mistake) the bill was filed by a creditor on behalf of himself and the other creditors.

It may be further observed that the plaintiff's object in seeking an injunction confessedly was, not to prevent the defendant from obtaining a preference over other creditors (for the estate was admitted to be solvent), but to protect against creditors a large amount of property specifically bequeathed to the plaintiff herself.

<sup>2</sup> Dick. 668.

<sup>3</sup> *Paxton v. Douglas*, 8 Ves. 520; *Perry v. Phelps*, 10 Ves. 34; *Curre v. Bowyer*, 3 Madd. 456; *Clarke v. Earl of Ormonde*, Jac. 108, 123-5.

<sup>4</sup> *Cleverley v. Cleverley*, cited 8 Ves. 521; *Paxton v. Douglas*, 8 Ves. 520; *Gilpin v. Lady Southampton*, 18 Ves. 469; *Clarke v. Earl of Ormonde*, Jac. 108, 125.

against whom an administration decree was obtained, as often as he was sued at law by any creditor of his testator, to file a bill against such creditor (*i.e.*, commence and prosecute a suit against him) for the sole purpose of obtaining an injunction; and the fact that administration suits were so very numerous made this objection all the more serious. Still, it was an objection which courts of equity could not themselves remove without introducing arbitrarily a great anomaly in procedure; and it was, therefore, a proper case for legislation. It was not easy, however, a hundred years ago, to obtain legislation in England for such a purpose; and, therefore, the question was, whether a serious practical inconvenience should be submitted to, or whether principle should be sacrificed; and the latter alternative was the one adopted. In the time of Lord Loughborough, the practice began of granting the injunction, without requiring any bill to be filed, *i.e.*, upon a motion made by the executor in the administration suit;<sup>1</sup> and this was in effect, not only giving relief upon motion, but it was giving relief upon a motion made in a suit in which such relief could not possibly have been given by decree; for it was entirely foreign to the case made by the bill, and it was given, not to the plaintiff in the suit, but to the defendant—not against the defendant, but against a total stranger to the suit.

Nor was the anomaly limited to the granting of injunctions on the application of the executor, without requiring him to file a bill; for it afterwards became the practice to grant them equally upon the application of the plaintiff in the administration suit,<sup>2</sup>—a still greater violation of principle. The granting of them without requiring a bill to be filed was in itself, of course, a violation only of the principles of procedure, but the granting of them on the application of the plaintiff in the administration suit was a violation of the rights of the parties; for the executor was the only person who had a right to an injunction;<sup>3</sup> and if the plaintiff in the administration suit had filed a bill for an injunction against a creditor who was suing the executor at law, the bill would clearly have been bad on demurrer. In short, while the granting of the injunction on the motion of the executor was

---

<sup>1</sup> *Paxton v. Douglas*, 8 Ves. 520; *Clarke v. Earl of Ormonde*, Jac. 108, 124, *per* Lord Eldon. See also *Hardcastle v. Chettle*, 4 Bro. C. C. 163.

<sup>2</sup> *Clarke v. Earl of Ormonde*, Jac. 108, 125; *Dyer v. Kearsley*, 2 Mer. 482, note.

<sup>3</sup> *Clarke v. Earl of Ormonde*, Jac. 108, 122, *per* Lord Eldon.

merely granting relief without a suit, the granting of it on the motion of the plaintiff in the administration suit was granting relief without a suit to a party who could not have obtained it by a suit.

As soon as it was settled that all actions at law by creditors against an executor would be stopped as soon as a decree was obtained against him for the administration of the testator's estate, of course it followed that, in the like event, all other suits in equity against him, prosecuted by creditors for their own exclusive benefit, would also be stopped.<sup>1</sup> Nor did the stopping of the latter involve any such difficulties of procedure as did the stopping of the former; for there was but one Court of Chancery, and all the courts of equity held by the different judges were branches of the Court of Chancery; and, therefore, when an administration decree was obtained against an executor in one suit, the proceedings in every other suit in equity against him were stayed upon a motion made by him in that suit. Moreover, since the passage of the Judicature Acts, what was always true of courts of equity has become true of courts of common law as well; for both classes of courts are now but branches of one Supreme Court. An injunction, therefore, is no longer necessary to stay the proceedings in an action at law against an executor; but a stay can be obtained upon a motion made by the executor in the action which is sought to be stayed.

At length, therefore, every executor acquired the means of having the personal estate of his testator administered in equity, and of having it divided among the several persons who had claims upon it, according to their respective rights as they stood at the time of the testator's death, and that too in spite of anything that the testator's creditors could do with a view to obtaining a priority over each other.

---

<sup>1</sup> There may be two concurrent suits in equity against an executor, both of which are for the administration of the testator's estate; and in that case, while neither suit can be stayed until a decree is obtained in the other, it does not follow that, when a decree is obtained in one, the other will be stayed. If the suit in which a decree is first obtained embraces everything which the other suit embraces, so that the plaintiff in the latter can have everything that he seeks in his own suit by coming in under the decree already made, then the proceedings in the other suit will be stayed. Otherwise, the latter suit will be permitted to go on. And if that embraces everything which is embraced in the suit in which the decree has been obtained, the proceedings in the latter will be stayed. See *Coysgarne v. Jones*, Amb. 613; *Law v. Rigby*, 4 Bro. C. C. 60; *Pott v. Gallini*, 1 S. & St. 206; *Jackson v. Leaf*, 1 Jac. & W. 229.

So, too, every creditor, legatee, and next of kin of a deceased person acquired the means of having the estate of the deceased administered in equity; but creditors never acquired the means of preventing an executor from giving a preference to one creditor of his testator over other creditors of the same degree. Executors had a right to give such a preference at common law, and equity never discovered any means of preventing them from doing it until an administration decree was obtained against them,<sup>1</sup> and of course an executor could delay a creditor considerably in obtaining such a decree. If, however, an executor prefer a creditor by paying him a part of his debt, and afterwards a decree is made for the administration of the estate, the creditor so preferred will not be allowed to receive anything under the decree until the other creditors have received the same proportions of their debts that he has received of his.<sup>2</sup>

Can the estate of a deceased person be administered upon a bill filed by his executor? To this question, the authorities furnish no certain answer;<sup>3</sup> but, upon principle, it seems clear that the answer must be in the negative. If an executor file such a bill, he must do so, not as a person having claims to enforce, but as a person against whom claims are made. He is, therefore, properly the defendant to such a bill; and the bill is properly filed by a creditor, legatee, or next of kin. What right, then, has the executor to reverse this state of things? When a person against whom a claim is made, instead of waiting to be sued, brings a suit himself against the claimant to have the claim against himself disposed of, he must have some special reason for doing so. What reason is there in the case now supposed? If, indeed, there is a controversy as to the persons who are entitled to the estate of a deceased person after his debts are paid, or as to the proportions in which the several claimants are entitled, the executor may undoubtedly file a bill against the claimants; but such a bill is in

---

<sup>1</sup> *Waring v. Danvers*, 1 P. Wms. 295. In the *Matter of Radcliffe*, 7 Ch. D. 733, Jessel, M. R., said the only way of preventing preferences by executors, before an administration decree was obtained, was by procuring the appointment of a receiver. A receiver cannot, however, be appointed unless there is misconduct in the executor (*Anon.*, 12 Ves. 4); and the preferring of one creditor to another — an act which is perfectly legal — cannot be deemed misconduct.

<sup>2</sup> *Wilson v. Paul*, 8 Sim. 63.

<sup>3</sup> See *Fielden v. Fielden*, 1 S. & St 255; *Newman v. Norris*, Dick. 259; *Rush v. Higgs*, 4 Ves. 638; *Davis v. Combermere*, 15 Sim. 394.

the nature of a bill of interpleader, and clearly no creditor of the testator can properly be a party to it. Such a bill, indeed, assumes that all the debts are paid; and it is very doubtful if it does not assume that all legacies about which no question is raised are also paid.

A notion seems to have once prevailed that an executor whose testator died insolvent might maintain a bill against the creditors of the latter, for the express purpose of procuring the estate to be divided among all the creditors *pro rata*, with such preferences only as existed by law at the time of the testator's death, and in *Buccle v. Atleo*<sup>1</sup> a demurrer to a bill of that description was overruled. Such a bill would be primarily a bill to restrain the testator's creditors from suing the executor at law; but as a consequence of that would be that the creditors would be deprived of their legal remedy, equity must provide them with another remedy; and, therefore, the decree, after directing an injunction to issue, would refer the cause to a Master to take an account of the estate and of the debts, with a direction to the Master to advertise for creditors to come in before him and prove their debts.<sup>2</sup> There would be but one objection to such a decree, but that would be conclusive, namely, that equity would be depriving creditors of their legal rights for no other reason than that it disapproved of their having such rights. Accordingly, the notion that such a bill would lie has long been exploded.<sup>3</sup>

---

<sup>1</sup> 2 Vern. 37.

<sup>2</sup> Such a decree was made in *Morrice v. Bank of England*, *supra*, p. 120; and, therefore, in that case the estate was administered in a suit in which the executrix was plaintiff. Whenever equity restrains the owner of a legal claim from enforcing his claim at law, it must itself take cognizance of and enforce the claim. When, indeed, an administration decree has been made against an executor, and he thereupon files a bill to restrain a creditor from suing him at law, the court has no occasion to do more upon the latter bill than decree an injunction; but that is because there is already a decree under which the creditor can come in.

<sup>3</sup> See *Backwell's Case*, 1 Vern. 152; *Morrice v. Bank of England*, Cas. t. Talbot, 217, 224-5, 3 Swanst. 573, 583, *per* Lord Chancellor Talbot. In the latter case it appears from 2 Bro. P. C. (Toml. ed.) 465, 481, that a bill had been filed by some of the creditors of *Morrice*, on behalf of themselves and the other creditors, to compel a *pro rata* division of the estate among all the creditors; but the bill was demurred to, and the demurrer was allowed. The difficulty in the plaintiffs' way was that they were in no condition to obtain an injunction. According to the practice afterwards established, the plaintiffs would have filed a bill simply for the administration of the estate; but whether such a bill would have done them any good or not, ought to have depended upon whether they could obtain an administration decree before those creditors whom the executrix wished to prefer could, with the assistance of the executrix, obtain a personal decree against the latter.

In spite of all that we have said in vindication of administration bills, it must be confessed that they still leave something to be desired. It has been seen that, upon a bill filed by a creditor on behalf of himself and all the other creditors, the final decree can direct payment to none but creditors, and that, upon a bill filed by a pecuniary legatee on behalf of himself and all other pecuniary legatees, the final decree can direct payment to none but creditors and specific and pecuniary legatees. It has also been seen that there is a difficulty in requiring all the assets to be paid into court in a suit, by the final decree in which they cannot all be paid out. Can, then, a bill by a creditor, or by a pecuniary legatee, be so framed that the final decree upon it can direct the distribution of the entire estate? In other words, can such a bill be filed on behalf, not merely of the plaintiff and the other members of the class to which he belongs, but of all persons who are interested in the estate, or who have claims upon it? It seems to have been generally supposed that it cannot. Why? Because it has been generally supposed that a creditor or legatee who files a bill on behalf of himself and others represents those others in the suit, and hence that the latter are constructively plaintiffs in the suit; and if this were so, it would follow that all those on whose behalf the bill is filed must constitute a class; for no one can be a constructive plaintiff in a suit who could not also be a nominal plaintiff, and all the plaintiffs in a suit, whether nominal or constructive, must be capable of acting together as a unit, and hence, if they have not all one right, they must at least have one and the same case to establish.

But is it true that all those, on whose behalf a creditor or a pecuniary legatee of a testator brings a suit against the executor, are plaintiffs in the suit? It seems not. First, none but the nominal plaintiff or plaintiffs are treated by the decree as plaintiffs. For example, the first decree when the suit is by a creditor directs the Master to take an account of what is due to the plaintiff and all the *other* creditors of the testator, and, after directing the Master to cause an advertisement to be published for the creditors to come in before him and prove their debts, the decree proceeds: "but the persons so coming in to prove their debts, *not parties to this suit*, are, before they are to be admitted as *creditors*, to contribute to the plaintiff their proportion of the expense of this suit,

to be settled by the Master."<sup>1</sup> So when the decree, in a suit either by a creditor or by a pecuniary legatee, directs that all the parties to the suit shall have their costs, to be paid out of the estate, only the nominal parties are included.<sup>2</sup> So too the final decree in a creditor's suit, while it provides for the payment of all creditors who have come in before the Master and established their claims, never speaks of them as parties to the suit, but refers to them as persons named as creditors in the schedule to the Master's report.<sup>3</sup> Secondly, none but the nominal plaintiff or plaintiffs are plaintiffs in fact. Until after the first decree is made, none but the nominal plaintiff or plaintiffs have anything to do with the suit, nor are in any manner affected by it; and those who do not choose to come in under the decree, forever remain total strangers to the suit; and yet every one who is constructively a plaintiff in a suit is so from the beginning, and is interested in and bound by everything that is done in it, and he may, therefore, apply to the court for leave to take part in its prosecution. Even those who come in under the decree in a suit by a creditor or legatee do not thereby become, constructively or otherwise, plaintiffs in the suit. It is true that, if their claims are investigated and rejected, they will be bound by the decision,<sup>4</sup> but that is because their claims have been tried; and though the trial may have been informal, yet it was had on their own application. Moreover, it is not the decree in the cause, but the Master's report and the confirmation of it by the court, that binds them. That those who come in under the decree are not represented by the nominal plaintiff or plaintiffs, appears also from the fact that, so far as they are represented in the suit at all, they severally represent themselves. So far are they, indeed, from being represented by the plaintiff, that they may contest the plaintiff's claim (as they may the claims of each other) in the Master's office. Thirdly, there is no necessity that all those on whose behalf the suit is brought should be constructive plaintiffs in the suit. When the suit is by a residuary legatee or next of kin, it will not be seriously claimed that the

---

<sup>1</sup> Seton on Decrees (1st ed.), p. 51.

<sup>2</sup> Creditors who come in under an administration decree do not even receive the costs of proving their debts. *Abell v. Screech*, 10 Ves. 355; *Harvey v. Harvey*, 6 Madd. 91; *Waite v. Waite*, 6 Madd. 110.

<sup>3</sup> Seton on Decrees (1st ed.), p. 58.

<sup>4</sup> See *Neve v. Weston*, 3 Atk. 557; *Teed v. Beere*, 28 L. J., Chan., 782; *Barker v. Rogers*, 7 Hare, 19; *Thomas v. Griffith*, 2 De G., F. & J. 555.

creditors and legatees who come in under the decree are constructive plaintiffs in the suit; and yet those who come in under the decree in such a suit stand in the same relation to the suit as those who come in under the decree in a suit by a creditor or pecuniary legatee. The only difference that exists is in the reason for their being let in. In the one case they are let in because the letting of them in is a *sine qua non* of the plaintiff's obtaining the relief which he seeks, while, in the other case, they are let in because the plaintiff voluntarily consents to their being let in. Fourthly, the creditors or pecuniary legatees of a testator do not constitute a class of persons in such a sense that they can all be made co-plaintiffs in a suit, either constructively or nominally. That they cannot all unite as nominal plaintiffs is clear; for not only has each of them, presumably, a separate and distinct right, but the right of each, presumably, depends upon a wholly separate and distinct case. Indeed, if any two creditors or pecuniary legatees of the same testator (not being joint creditors or legatees) should unite in filing a bill for the recovery of their respective debts or legacies, their bill would be bad for multifariousness. And yet the sure mode of testing the question, whether a given class of persons can be made constructively co-plaintiffs (one of their number being the nominal plaintiff), is to inquire whether they could all unite as nominal co-plaintiffs; for there is but one reason for permitting persons to be made constructive parties to a suit, namely, that they are so numerous that it is inconvenient to make them all nominal parties.

But even if all pecuniary legatees, and all creditors whose debts are of the same degree, constitute each a class, for the purposes of the question now under consideration, it will not follow that all creditors, whatever their degree, also constitute a class. A creditor by judgment or by specialty differs as much, for the purposes of the present question, from a creditor by simple contract as the latter does from a pecuniary legatee; and yet no one will claim that creditors and pecuniary legatees can be made co-plaintiffs, either constructively or nominally. To claim, therefore, that all the persons on whose behalf a suit is brought by a creditor or a pecuniary legatee are constructive co-plaintiffs is to claim that the practice which has always prevailed is erroneous; for it has always been the practice for creditors to file their bills on behalf of themselves and all other creditors, of whatever



degree;<sup>1</sup> and, indeed, any other practice would have been attended with the greatest inconvenience, so long as the debts of deceased persons had priority according to their respective degrees.

Undoubtedly, it has been common for two or more creditors or pecuniary legatees to unite in filing a bill on behalf of themselves and all other creditors or pecuniary legatees; but that practice has arisen from the error of supposing that those who file the bill represent all those on whose behalf it is filed; for it is well known that, when the plaintiffs in a suit constitute a class of persons, some of whom are made plaintiffs by representation, the bill not only may, but should, be filed by more than one member of the class, in order that the court may have more security than the presence of a single member of the class would afford that the interests of those who are present only by representation will be properly cared for.

Upon the whole, therefore, it seems that those on whose behalf an administration bill is filed are not represented by the person who files the bill, and therefore they need not constitute a single class of persons, but may comprise all persons who are interested in the estate to be administered, or who have claims upon it; and it seems desirable that, in many cases at least, administration bills should be filed on behalf of all the persons just named. Undoubtedly there is a wide distinction between creditors, on the one hand, and legatees or next of kin, on the other; and there may be litigation or other causes of delay affecting the latter with which the former are not concerned, and by which, therefore, they ought not to be delayed in obtaining payment of their debts. It does not follow, however, because a bill is filed on behalf of legatees or next of kin, as well as of creditors, that the creditors must wait for the payment of their debts until the claims of legatees or next of kin can also be satisfied; for, when the first decree is made, referring the cause to a Master, the Master may be directed to

---

<sup>1</sup> It has, indeed, been made a question whether a secured creditor can file a bill on behalf of unsecured creditors. Thus, in *Burney v. Morgan*, 1 S. & St. 358, 362, Sir John Leach, V. C., said: "A mortgagee has no common interest with the creditors at large, and cannot sue on their behalf." So in *White v. Hillacre*, 3 Y. & Coll. 597, it was held that a mortgagee could not sue both as mortgagee and also on behalf of himself and all other creditors of the debtor, such rights of suing being inconsistent with each other. On the other hand, in *Skey v. Bennett*, 2 Y. & Coll. C. C. 405, it was held that a mortgagee may maintain a bill on behalf of himself and all the other creditors of the deceased mortgagor. And see *infra*, pp. 134-5.

make a separate report as to creditors as soon as the reference is completed as to them; and, as soon as such report is made and confirmed, the cause may be set down for a further hearing, and a decree made for the payment of the creditors, leaving the cause to proceed as to legatees or next of kin.<sup>1</sup>

If it be asked what inducement a creditor can have to file a bill on behalf of legatees or next of kin, it may be answered that he has the same inducement that he has to file a bill on behalf of other creditors than himself, namely, the avoiding of the risk of having his bill superseded by a bill filed by a residuary legatee or a next of kin, or even by another creditor on behalf of the legatees or next of kin as well as of the creditors.

Thus far it has been assumed that the creditors of a testator were seeking payment of their debts out of his personal estate alone. But bond creditors were always entitled to be paid out of the testator's real estate, if his personal estate proved deficient; and, therefore, when a bond creditor of a deceased debtor filed a bill to compel payment of his debt, he was entitled to make the debtor's heir or devisee, as well as his executor, a defendant to the bill, and it was necessary for him to do so, if he wished to avail himself of his remedy against the real estate. It was also necessary that he should file his bill on behalf of all the bond creditors of the testator; otherwise the heir or devisee might demur.<sup>2</sup> The reason of this was that such a bill, as against the heir or devisee, was a bill to have the testator's real estate, or a sufficient part of it, sold or mortgaged, under the direction of the court, for the payment of the testator's bond debts; and, as this

<sup>1</sup> See *Golder v. Golder*, 9 Hare, 276.

<sup>2</sup> *Bedford v. Leigh*, Dick. 707; *Johnson v. Compton*, 4 Sim. 37; *May v. Selby*, 1 Y. & Coll. C. C. 235; *Ponsford v. Hartley*, 2 J. & H. 736; *Worraker v. Pryer*, 2 Ch. D. 109; *Fryer v. Royle*, 5 Ch. D. 540. The better view, however, would seem to have been that the decree should be for the benefit of all the bond creditors, whether the bill was in terms on their behalf or not; and that view appears to have formerly prevailed. *Martin v. Martin*, 1 Ves. 211, 213-14; *White v. Hillacre*, 3 Y. & Coll. 597, 610, note. As a bond creditor is entitled to a remedy in equity against the heir or devisee only on the terms of his permitting all other bond creditors to share in the benefit of his suit, the mere fact of his making the heir or devisee a defendant to his bill ought, it seems, to be deemed sufficient evidence, unless the contrary appears, that he intends his bill to be for the benefit of all the bond creditors. See *Cowper v. Blissett*, 1 Ch. D. 691; *Worraker v. Pryer*, 2 Ch. D. 109. The view stated in the text seems to have originated in the idea that, when the bill is in terms on behalf of all the other bond creditors, the latter become constructively co-plaintiffs in the suit, and hence that a bill which is not in terms on behalf of all the bond creditors is defective for want of parties. See *supra*, p. 128 *et seqq.*

was a proceeding which required considerable time, and involved considerable labor and expense, considerations of convenience and economy demanded that it should be gone through with once for all;<sup>1</sup> and, therefore, no creditor was permitted to file such a bill solely for his own benefit. The bill ought also, for a reason which will appear presently,<sup>2</sup> to be on behalf of the simple contract creditors as well as of the other bond creditors; but the only penalty that the plaintiff incurred by not so framing his bill was the risk of having it superseded by the bill of some other creditor more properly framed. It is indispensable, too, that the executor be a co-defendant with the heir or devisee, as the latter are entitled to have the personal estate exhausted before the real estate is resorted to; and it is only by making the executor a co-defendant that it can be ascertained whether and to what extent the personal estate is insufficient for the payment of debts.<sup>3</sup>

The first decree, upon a bill to which the heir or devisee is made a defendant, will first direct an administration of the personal estate, just as if the executor were the sole defendant; and if the personal estate be found by the Master to be insufficient to pay the debts in full, he will be directed to inquire and report to the court what real estate, if any, the debtor left.<sup>4</sup> If the Master report the personal estate to be insufficient to pay the debts, and that the debtor left real estate, the cause will be set down for a further hearing, and a second decree will be made directing the Master to cause the amount in which the personal estate is deficient to be raised by a sale or mortgage of the real estate, or a sufficient part thereof, and the money so raised to be paid into court; and if the required amount cannot be raised by a sale of the real estate, the Master will be directed to take an account of the rents and profits of such real estate from the time of the testator's death to the time of the sale; and when the amount of such rents and profits shall thus be ascertained the same will also be required to be paid into court. When the

---

<sup>1</sup> It is obvious, too, that real estate can generally be sold to much better advantage if it is known from the beginning how much will have to be sold, or rather how much money will have to be raised.

<sup>2</sup> See *infra*, pp. 136-7.

<sup>3</sup> *Plunket v. Penson*, 2 Atk. 51; 4 *Harvard Law Review*, pp. 126-7; *Rowell v. Morris*, L. R. 17 Eq. 20; *Dowdeswell v. Dowdeswell*, 9 Ch. D. 294. But see *Ambler v. Lindsay*, 3 Ch. D. 198.

<sup>4</sup> *Seton on Decrees* (1st ed.), pp. 134-5.

directions in the decree have been fully carried out, and the Master has made his report, and his report has been confirmed, the cause will be set down again, and a third and final decree will be made, the terms of which will be the same, *mutatis mutandis*, as those of the final decree in a suit against the executor alone.

As soon as the second decree is made, all proceedings at law against the heir or devisee will be enjoined on the application of the latter, and for the same reason that all proceedings at law against the executor will be enjoined on his application as soon as the first decree is made;<sup>1</sup> and it is somewhat remarkable that this principle was established as to heirs and devisees before it was established as to executors.<sup>2</sup>

A creditor of a living debtor who has a lien upon the property of the latter for the security of his debt may first sue the debtor personally for the debt, and, if he fail to obtain payment in full by that means, he may then realize upon his security; or he may first realize upon his security, and, if that prove insufficient to pay the debt in full, he may then sue the debtor personally for what still remains due to him. If he be able to realize upon his security without a suit, an action at law against the debtor personally will give him, in either case, all the judicial assistance that he will need. But if he can realize upon his security only by a suit in equity (*e.g.*, where a mortgagee can procure a sale of the mortgaged property only by a suit in equity for that purpose), a suit in equity, as well as an action at law, will in each case be necessary; and the only question with the creditor will be whether he will first sue at law and then in equity, or first in equity and then at law.

What is thus true of a creditor of a living debtor is also true, *mutatis mutandis*, of a creditor of a deceased debtor who has a lien upon property of the latter, except that, in the case of a creditor of a deceased debtor, one suit in equity against the representative or representatives of the debtor will answer every purpose. In such a suit, the bill may be framed just as it would be if the creditor had no security,<sup>3</sup> except that it will pray (by way of additional

<sup>1</sup> *Sumner v. Kelly*, 2 Sch. & Lef. 398. See *Farnham v. Burroughs*, Dick. 63.

<sup>2</sup> *Martin v. Martin*, 1 Ves. 211, 213.

<sup>3</sup> And, therefore, it may be either for the plaintiff's exclusive benefit, or on behalf of the plaintiff and all the other creditors, though, if it seek relief against the real estate of the testator, it must, of course, be on behalf of all creditors who are entitled to such relief. See *Bedford v. Leigh*, Dick. 707.

relief) for a realization of the security by a sale;<sup>1</sup> and, in analogy to the case of an action at law and a suit in equity by a creditor of a living debtor, he may either pray, first, that the debt be paid by the representative or representatives of the debtor, and, if payment in full shall not be thus obtained, that then the security be realized; or he may pray, first, that the security be realized, and, if that prove insufficient to pay the debt in full, that the remainder be paid by the representative or representatives of the debtor.<sup>2</sup>

It may be inferred from what has been said that, when a debtor dies insolvent, a creditor who has security for his debt may claim dividends from the estate upon his whole debt, just as if he had no security, and may then resort to his security for whatever remains due to him; and such was formerly the law.<sup>3</sup> But, by the Judicature Act, 1875,<sup>4</sup> the rule which has always prevailed in bankruptcy (according to which a secured creditor receives dividends upon so much only of his debt as the security is insufficient to pay) was made applicable to the administration in equity of the estates of deceased persons.

It remains to speak briefly of certain important incidental objects accomplished by equity through the instrumentality of administration suits, — objects which otherwise either would not have been accomplished at all, or would have been accomplished only at a greatly increased expense and delay. These objects are chiefly, first, the promotion of equality among the creditors of deceased debtors; secondly, the application of the real estate of deceased debtors to the payment of all their debts; thirdly, the carrying out of the intentions of testators as to the dispositions of their estates.

First. It has been seen that the common law ranked the creditors of deceased debtors according to the nature of their debts, and that it also empowered executors to make such preferences as they chose among creditors of their testators whose debts were of the same nature. These preferences equity had no power to prevent, but it could and did greatly mitigate the injustice which they would otherwise have worked. The way in which equity did this

<sup>1</sup> *Skey v. Bennett*, 2 Y. & Coll. C. C. 405; *King v. Smith*, 2 Hare, 239. But see *White v. Hillacre*, 3 Y. & Coll. 597; *Raikes v. Hall*, cited 3 Y. & Coll. 605.

<sup>2</sup> See *Bedford v. Leigh*, *supra*.

<sup>3</sup> *Mason v. Bogg*, 2 M. & Cr. 443, overruling *Greenwood v. Taylor*, 1 R. & M. 185.

<sup>4</sup> 38 & 39 Vict., c. 77, s. 10.

was very characteristic (and well illustrates the methods by which equity accomplishes its objects), namely, by counteracting one preference by means of another preference, and thus bringing about an equality. Thus, if a testator, when he died, owed A and B \$1,000 each by simple contract, and the executor has paid A \$500 while he has paid B nothing, equity will first pay B \$500, and then it will pay them both ratably.<sup>1</sup> The principle upon which equity does this is that, when it takes upon itself the administration of an estate, it succeeds to all the powers which the executor previously had, and that it will wield those powers in such manner as will best serve the purposes of justice. It was, however, in counteracting the preferences given by law that equity achieved its greatest success; and this it did upon another principle, namely, that equity is entitled to deal in its own way with rights which are of its own creation. The estates of deceased persons were divided by equity into two great classes of assets, namely, legal and equitable. Legal assets were such as the personal and real representatives of deceased debtors were bound by law to apply in payment of the debts of the latter, while equitable assets were such as they were bound only in equity so to apply. Moreover, this latter class of assets (for reasons which it is not necessary here to enter into) embraced a much larger amount of property than might at first sight be supposed. Whenever, therefore, equity was called upon to administer an estate which consisted in part of equitable assets, it not only applied the latter to the payment of all debts equally, whatever their degree, but, if any creditors to whom the law gave a preference had availed themselves of that preference, the decree directed that such creditors should receive nothing out of the equitable assets until the other creditors were paid the same proportion of their debts out of the equitable assets that they had received out of the legal assets.<sup>2</sup>

Secondly. Equity could not make the real estate of a deceased debtor directly liable for his simple contract debts, without a violation of law; but it exercised the right of throwing the whole burden of the specialty debts of deceased debtors upon their real estate, thus securing the whole of the personal estate for the simple contract creditors; and this it did by means of subrogation. Accordingly, in every administration suit in which the heir or

---

<sup>1</sup> See *supra*, p. 126, n. 2.

<sup>2</sup> Seton on Decrees (1st ed.), p. 90; Haslewood v. Pope, 3 P. Wms. 322.

devisee of the deceased debtor was a defendant, if there were or might be specialty debts, the decree directed that, in case the specialty creditors should exhaust any part of the personal estate in payment of their debts, then the simple contract creditors should stand in their place, and receive payment *pro tanto* out of the real estate.<sup>1</sup> In thus acting, equity was mitigating the effect of an iniquitous rule of law, and was relieving simple contract creditors from a gross injustice; and if the real estate had been by law primarily liable for the specialty debts, the personal estate being, as to such debts, only a surety for the real estate, equity would, as a matter of course, have thrown the specialty debts wholly upon the real estate, in the manner just stated; and even if the personal and real estates had each been primarily liable for the specialty debts, it would have been a matter of course for equity to have thrown upon the real estate its *pro rata* share of such debts. In truth, however, the personal estate was by law primarily liable for all debts, and it was only as a surety for the personal estate that the real estate was liable even for specialty debts; and it seems, therefore, impossible to justify equity, in point of law, in relieving the personal estate from specialty debts by throwing the latter upon the real estate even for so worthy an object as that of securing payment of the simple contract debts.<sup>2</sup>

Thirdly. When a deceased person has left a will, by which he has divided his estate among various persons, or by which he has divided parts of it among various persons, leaving other parts of it undisposed of, it is frequently a very nice question of construction, upon which of the various beneficiaries under the will, and in what order, the burden of the testator's debts and pecuniary legacies shall fall; and this question must of course be decided before the estate can be fully administered. So long as debts and legacies are imposed only upon property which is by law liable for the payment of them, or which is made so liable by the testator, or upon property over which, being equitable assets, the court has full power no technical difficulty can arise, nor any difficulty as to the power of the court. Having decided the question of construction, the court simply proceeds to direct such parts of the estate to be applied in payment of debts and pecuniary lega-

<sup>1</sup> Seton on Decrees (1st ed.), p. 88. See *Pott v. Gallini*, 1 S. & St. 206; *Wilson v. Fielding*, 2 Vern. 763, 10 Mod. 426; *Gibbs v. Ougier*, 12 Ves. 413.

<sup>2</sup> See 1 Harvard Law Review, pp. 69-70.

cies as it has decided ought to be so applied, and in such order as it has decided that they ought to be applied.<sup>1</sup> It often happens, however, that the court goes beyond the limits just indicated. For example, the testator gives specific and pecuniary legacies, and leaves land to descend to his heir, and leaves debts sufficient to exhaust his entire personal estate; but if the specialty debts be all thrown upon the land, the personal estate, not specifically bequeathed, will be sufficient to pay the simple contract debts and the pecuniary legacies. In such a case, the court by its decree will direct that in case the specialty creditors exhaust any part of the personal estate, the simple contract creditors first, and then the pecuniary legatees, shall stand in the place of such specialty creditors, and receive payment *pro tanto* out of the land.<sup>2</sup> The argument, of course, is that the testator must have intended that his legacies should be paid if he left property sufficient to pay them, and that his heir should take only what was left after debts and legacies were paid. The answer is, that legacies are not by law payable out of land any more than debts by simple contract are, unless they are charged upon the land by the testator. It will be admitted that the court cannot make the land liable directly for the payment of legacies, any more than of simple contract debts; and, therefore, it cannot do so indirectly. There seems to be no difference between the case of pecuniary legacies and that of simple contract debts, except in the object which the court seeks to accomplish, the object being, in the one case, to carry out the intention of the testator, in the other, to do justice to simple contract creditors, both undoubtedly worthy objects, but yet not sufficient to justify the court in violating the law.

C. C. Langdell.

[To be continued.]

<sup>1</sup> Haslewood v. Pope, 3 P. Wms. 322; Arnold v. Chapman, 1 Ves. 108; Davenhill v. Fletcher, 1 Mauld. Ch. Pr. (3d ed.), p. 768.

<sup>2</sup> Seton on Decrees (1st ed.), pp. 93-4, 96-7; Davenhill v. Fletcher, *supra*.



## THE PREVENTION OF UNFAIR COMPETITION IN BUSINESS.—THE RECENT OPINION OF CHIEF JUSTICE FULLER.

---

**T**WO important events have recently taken place which are, let us hope and believe, significant as indicating a right development of thought in the United States:—

(1) Congress, after a century of inconsistency, has enacted a copyright act, and (2) the Supreme Court of the United States has spoken bravely and wisely on the subject of commercial piracy.

The new copyright act might with propriety have been entitled "An Act for the promotion in the United States of the art of printing and analogous industries." It is baldly unconstitutional in spirit, and it is good to-day only because the things of yesterday were too disreputable to admit of a moment's defence. Our ill-assorted statutes open wide the doors of their privileges to the foreign vagabond who invents an attachment for hand-organs; he may enter at the lowest price, and without let or hindrance. But Bryce with his excellent book, and Herbert Spencer, and Sir John Lubbock, and Professor Huxley, and the rest, to each of whom we owe an inestimable debt, are required to stand and pay the printers and paper-maker's tax, or else deliver without reservation or redress. Certainly the new act is better than the old,—very much better; and for the reason that some evils are very much better than others.

But wholly different is the action of the Supreme Court of the United States upon a cognate subject. The highest function of that exalted tribunal is the wise direction of enlightened thought. If it shall ever lose its capacity to understand, and respond to, and promote the intellectual and ethical progress of the nation, it will fail in its largest duty. If it shall ever finally determine that the United States of the twentieth century is to be held by the duress of the rules and precedents of the England of even the eighteenth century, its judgments will be valueless except as the special verdicts of a learned and upright jury.

In *Lawrence Manufacturing Company v. Tennessee Manufacturing Company*<sup>1</sup> the United States are made to look in the direction of commercial honesty and the position which they ought to occupy in the family of nations and before the world. The court, possibly for the first time, has held up with a strong hand the lamp which Judge Story trimmed a half a century ago,<sup>2</sup> the light of which may have been obscured, but which cannot be extinguished.

In this important case the Supreme Court for the first time in its history recognizes and explains the fundamental differences between the piracy of a trade-mark and the prevention of unfair competition in business. In *Goodyear Co. v. Goodyear Rubber Company*,<sup>3</sup> allusion was made to the existence of a rule whereby "unfair trade" is restrained, but no attempt was made to define it or to interpret the adjudications which illustrate its application and purpose.

The lucid and accurate opinion of Chief Justice Fuller establishes a classification which is obviously logical and obviously useful and of value to the public; and his conclusions are at variance with perhaps not a single well-considered case to be found in the books.

The doctrines affecting the protection of technical trade-marks are easily understood; but the subject of what has come to be known as "unfair competition in business" is much broader and more intricate. Its evolution and development have been characterized by a great deal of artificial reasoning and not a little judicial remark which has been distinctly arbitrary; but the seminal and underlying doctrine which supports the most recent adjudications is really very old. It is the leaven of a number of the opinions of Lord Eldon;<sup>4</sup> and it was strongly stated and made the basis of decision by Lord Langdale in cases which are still cited as useful precedents.

In *Croft v. Day*,<sup>5</sup> Lord Langdale said: "No man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really

<sup>1</sup> 138 U. S. 537.

<sup>2</sup> 3 Story, 458.

<sup>3</sup> 128 U. S. 597.

<sup>4</sup> *Hogg v. Kirby*, 8 Ves. 215; *Cruttwell v. Lye*, 17 id. 335.

<sup>5</sup> 7 Beav. 84.

selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud.

"The right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others."

After pointing out the similarities between the labels of the parties and the evidence of a purpose on the part of the defendant to mislead the public, his Lordship continues: "My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the name of Day & Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not in fair and honest dealing entitled."

In the old case of *Croft v. Day* we have the same doctrine and rule which is expounded by the Chief Justice of the Supreme Court of the United States at the end of the nineteenth century. The intervening years have evolved little more than a classification of the cases, with the important results which a true classification ensures.

In the *Leather Cloth Company's* case, decided in 1865,<sup>1</sup> the House of Lords refer with qualified disapproval to *Croft v. Day*. The Lord Chancellor said: "But, although the jurisdiction is now well settled, there is still current in several recent cases language which seems to me to give an inaccurate statement of the true ground on which it rests." He then says, after having referred to the case just mentioned, and others:—

"The true principle, therefore, seems to be, that the jurisdiction of the court in the protection given to trade-marks rests upon property, and that the court interferes by injunction because that is the only mode by which such property can be effectually protected."

If doubts had existed as to there being a right of property in a

---

<sup>1</sup> 11 H. L. C. 523.

technical trade-mark, they were removed by the Leather Cloth Company's case; and it is equally certain that that case did not destroy or displace the force of Lord Langdale's reasoning as laid down in *Croft v. Day*, except, perhaps, to the extent that it struck out certain loose expressions which were not of the substance of his argument.

Some years later there arose in the House of Lords the case of *Wotherspoon v. Currie*,<sup>1</sup> cited with approval in the opinion before us, in which the doctrine of *Croft v. Day* was in effect approved in a number of opinions of exceptional value.

And at the end of the century we have the opinion of Chief Justice Fuller, and a recognition of the existence of the two kinds of cases: (1) those dependent upon a right of property, and (2) those dependent upon fraud, whereby the earlier cases and the thought and learning of the past are harmonized and made to run hand in hand.

The leading and authoritative adjudications which have been mentioned are supplemented by many others of more or less significance, which have tended in the same direction, and to strengthen and make safe the solutions which have been accomplished.

The precedents cited by Chief Justice Fuller are among the best and most instructive examples which relate to the subject of unfair competition in business. To them might have been added others in which imitations of collocations of words, styles of packages and labels, characteristic signs, ornamentation of coaches, and analogous indicia have been restrained. The cases of this nature may be divided into two classes: (1) those which relate to the use of things which appeal to the eye, and (2) those which relate to the use of words.

Concerning the former, it may be said that it is not clear that the law is not in an unsettled condition, while in respect of the latter class very little remains to be explored.

The cases which relate to unfair competition by means of words, and symbols which are the equivalents of words, are, when understood, harmonious, and to one effect. The rule deducible from them is the rule of *Croft v. Day*, no more, no less; and that rule is this: —

Courts of equity will direct the manner in which words that are

---

<sup>1</sup> L. R. 5 H. L. 508.

*publici juris* shall be used, and will prohibit their use in an inequitable manner for the purpose of misleading the public and displacing an existing business.

Beyond this none of the cases go, nor can they be made to go without endangering the doctrine which supports them. Thus, in *Wotherspoon v. Currie*, the wrong-doing consisted not in the use of the word "Glenfield" in the abstract, but in the use of that word in a particular way. It was printed by the defendant in conspicuous type, whereby his starch was offered and sold as "Glenfield Starch;" he did not use the word "Glenfield" to indicate where his article was made, but, in the words of the Court of Appeals of New York, as "a short phrase between buyer and seller," or, in the words of the Supreme Court of the United States, "the phrase" which indicated "the wish to buy, and the power to sell from that origin." He used it in that "secondary sense" which had come to mean the starch of the complainant.

In *Thompson v. Montgomery* the designation "Stone Ale" was used directly as the name of defendant's product. Had it been honestly applied to indicate his place of business, and not as a distinctive name associated by long use with complainant's article, it would not have been within the reasoning of the court.

In the cases relating to the use of proper names the same rule has been applied. There is a concurrence of opinion, many times repeated, that courts of equity will not prohibit a man from using his own name, but will direct how he shall use it, and compel him to use it honestly. The extent to which the defendant will be enjoined must necessarily depend in each instance upon the circumstances of the case.

Even if the word which is protected is, in an accurate sense, a trade-mark and the undisputed property of the plaintiff, there is no rule whereby the defendant may be absolutely prohibited from applying that word to his goods, or from using it in his price-lists and announcements and otherwise in connection with his business.

The defendant has under all circumstances an indisputable right, in every lawful way, to state any fact concerning his article, even if in so doing he uses plaintiff's word-symbol. The only restriction which the law imposes is that he shall not so use it that the manner of its use will tend to give a false name to his article and enable the sale thereof, actually or constructively, as and for the article of the plaintiff. Undoubtedly the courts will jealously

measure the character of the defendant's use of plaintiff's word-symbol; but they have power only to direct and regulate, and not power to prohibit.

"When the common law" (say the Supreme Judicial Court of Massachusetts) "developed the doctrine of trade-marks and trade-names it was not creating a property in advertisements (or in names) more absolute than it would have allowed the author of 'Paradise Lost;' but the meaning was to prevent one man from palming off his goods as another's, from getting another's business or injuring his reputation by unfair means."<sup>1</sup>

The true distinction is nowhere more clearly illustrated than in *Russia Cement Co. v. Le Page*,<sup>2</sup> which was decided by the same court as the case which has just been cited. The designation at issue was "Le Page's Liquid Glue," which the defendant, Le Page, had made over to the plaintiff, which he had subsequently used in violation of his covenants, and the use of which he sought to justify on the ground that he could not be prevented from making use of his own name. The court said:

"We are of opinion, therefore, that the defendant should be enjoined from using the words 'Le Page's Improved Liquid Glue,' or 'Le Page's Liquid Glue,' to describe the article manufactured by him. . . . In order to avoid misunderstanding, we add that, while the defendant cannot use the words adopted as a trade-name for the article manufactured by him, we do not decide that he may not use the words 'Liquid Glue' or other appropriate words to describe his product, or to state in that connection that he is himself the manufacturer of it."

The distinction here pointed out is not an artificial or unimportant one. The decision is that the name "Le Page" and the term "Liquid Glue" may both be used by the defendant, but not in the form and manner practised by the complainant. There is thus a recognition of the ancient and long-settled rules of the common law, and, at the same time, an efficient application of those which contemplate the prevention of unfair competition.

And it may not be going too far to say that the opinion of Chief Justice Fuller and the precedents which are cited therein weaken, if they do not actually break, the supposed significance of not a few of the earlier cases in which the distinctions now said to be of controlling importance are lost sight of.

<sup>1</sup> *Chadwick v. Covell*, 151 Mass. 190.

<sup>2</sup> 147 Mass. 206.

It has happened in many instances in which descriptive words have been involved, that, by reason of the character of the pleadings, or because there was no attempt to apply the doctrine of unfair competition, the plaintiff has failed. But the effect of these cases is to establish only that descriptive words are *publici juris*, they do not decide that the manner in which such words are used will not be regulated according to the maxims of equity. There are decisions, perhaps, which justify deliberate fraud; but they are based, in almost every instance, upon an illogical view of the common-law rights of the defendant, and the assumption that the plaintiff was assailing those rights.

Lord Hardwicke, who was, in his day and generation, a useful judge, refused to grant an injunction, saying that he knew of no instance of restraining one trader from making use of the same mark with another.<sup>1</sup> But at a later date Judge Wallace said: —

"All practices which tend to engender unfair competition are odious and will be suppressed by injunction."<sup>2</sup> The law of the period of Lord Hardwicke is not the law of to-day.

But there is no real conflict between the authorities; there has been merely an evolution of thought whereby we reason with better results and are enabled to understand the old doctrine and more intelligently to apply it.

Perhaps the larger expression is due to looking at the old doctrine under a stronger light and with the aid of the influences of an increasing civilization.

Considered apart from its technical character, the decision of the Supreme Court is of pronounced significance and value, because it is a deliverance in the direction of that which tends to elevate the State as against that which tends to degrade it. It is an announcement, at the opening of the twentieth century, that in the matter of the justification of commercial piracy the United States are breaking away from the narrow application of imperfect reasoning for the sake of the reasoning and its imperfections only.

*Rowland Cox.*

---

<sup>1</sup> *Blanchard v. Hill*, 2 Ark. 484.

<sup>2</sup> 27 Fed. Rep. 22.

# HARVARD LAW REVIEW.

---

Published monthly, during the Academic Year, by Harvard Law Students.

---

SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER.

---

## *Editorial Board.*

OLIVER PRESCOTT, JR., . . . .	<i>Editor-in-Chief.</i>
PHILIP S. ABBOT, <i>Treasurer,</i>	RICHMOND O. AULICK,
ALBERT S. BARD,	ALBERT E. HADLOCK,
NORMAN HAPGOOD,	CARLETON HUNNEMAN,
J. WRIGHT HUNT,	FREDERICK B. JACOBS,
M. DAY KIMBALL,	JAMES G. KING,
JAMES M. NEWELL,	PHILIP WARDNER,
CHARLES WARREN,	GEORGE E. WRIGHT.

---

IT is with much sorrow that we are obliged to record the death, since our last issue, of Mr. Marland Cogswell Hobbs, a graduate of this school, and one of the founders of the REVIEW. Mr. Hobbs was a man of rare gifts and exceptional promise, an honor to the school and to his profession. His loss will be deeply felt by the many who knew and respected him.

THE COLUMBIA AND NEW YORK LAW SCHOOLS.—The members of this school will have heard with much interest of Professor Keener's appointment as Dean of the Columbia Law School, to take the place of Professor Dwight, who resigned last spring. The Columbia Law School has reopened this year under an entirely new staff of instructors, consisting of four professors of law, two lecturers, and the faculty of the School of Political Science, the latter giving the instruction in Roman and Public Law and Comparative Jurisprudence. And while each individual instructor has full liberty in the choice of methods, apparently a system of instruction will be followed which, with some modification, is modelled on that which Professor Langdell has so successfully inaugurated and carried on here. The case system will for the most part be used, with the slight innovation, introduced by Professor Keener, of having the work of some well-known text-writer bound in with the selection of cases in such a way as to enable the class to take up text and cases together. This is to be done especially in the first or junior year, and has been introduced with the purpose of relieving the uncertainty and embarrassment by which first-year men are met in using the case system pure and simple. Whether the change is one for the better of course remains to be seen. The course is one covering three years, and is not designed in any way to be a supplement to office work. Several subjects will be carried on con-



currently, as at this school, instead of the former Columbia method of taking up one subject until finished and then passing on to the next.

The New York Law School, on the other hand, has been organized this year with a view to perpetuating the old Columbia or so-called "Dwight" system of instruction (which is little more than the discarded Harvard method as pursued by Professors Parsons, Washburn, and others). Its dean is Professor Chase, late of Columbia, and its faculty is composed of the instructors who were associated with Professors Dwight and Chase. The school is situated in the Equitable Building, in the business centre of the city, with the various courts near at hand, in the midst of many law offices, and having access to the law library in the building, comprising about thirteen thousand volumes — a library a little more than half the size of the Columbia law library. The course is to cover two years, and is so arranged that members of the school can spend each morning or afternoon in a law office, and this they are distinctly encouraged to do. Text-books will be used entirely, with occasional references to cases by way of illustration. Here, as formerly at Columbia, each subject will be studied until completed, when the next subject will be taken up, and so on to the end of the year. The aim of this school is to give a thorough, practical legal education, to enable a man, at the end of two years, to pass his bar examinations, and enter on the practice of his profession. The theory, history, and science of the law are disregarded, as being rather food for the jurist than for the practical lawyer.

A discussion of the comparative merits of these two most opposite methods would be unprofitable. Imbued as we are at this school with the methods and ideas to which Professor Langdell has given his name, our sympathies must naturally be with Professor Keener and his work. Whatever may be the advantages of the system adopted by the New York Law School, experience has shown that in the long run the thorough, systematic study of legal principles which the Langdell method requires fully as well enables its votaries to cope with the serious problems of the law.

---

LEGAL DETRIMENT IN CONTRACTS. — The Court of Appeals of New York has lately rendered a decision in the case of *Hamer v. Sidway*,<sup>1</sup> reversing a decision of the Supreme Court. The facts of this case briefly were that the defendant's testator offered to the plaintiff the sum of five thousand dollars, if he would refrain from smoking and drinking liquor until he became of age. The plaintiff performed the condition and, after asking for the money, brought this action. The Supreme Court decided in favor of the defendant, on the ground that the plaintiff had incurred no detriment, it being no disadvantage to refrain from habits which "are not only expensive but unnecessary and evil in their tendency." When the decision was reported, the REVIEW, Vol. 4, page 237, pointed out that the court had misunderstood the meaning of the term "legal detriment." We contended that the term meant the giving up of a legal right, and that the plaintiff had done this. The judgment of the Court of Appeals is based on this definition. Parker, J., speaking of the defendant's contention that the plaintiff incurred no detriment, as what he did was really beneficial to him,

---

<sup>1</sup> 124 New York, 538.

said: "Such a rule could not be tolerated, and is without foundation in the law. . . . In general, the waiver of any legal right at the request of another party is a sufficient consideration for a promise." It is satisfactory to notice that the attempt to narrow the meaning of the term "detriment" has been so decidedly overruled.

THE RIGHT TO PRIVACY. — In the article by Messrs. Warren and Brandeis on the Right to Privacy, published in this REVIEW last December, after a sketch of the many fictions and fewer open extensions by which the courts have met the modern demand for protection to the more ideal and intangible interests of the individual, the authors say:

"If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.

"The right of one who has remained a private individual to prevent his public portraiture presents the simplest case for such extension."

In Judge O'Brien's decision given last month, in the case of *Schuyler v. Curtis, Donlevy and others*, this hinted prophecy has its fulfilment. Mrs. George Schuyler, though largely interested in private charities, had never in any way entered public life. On her death, some zealots known as the "Woman's Memorial Fund Association" undertook to commemorate her good deeds by a statue of her, to be designated "The Typical Philanthropist," and placed in Chicago in '93 as a companion piece to a bust of the well-known agitator, Susan B. Anthony, to be called "The Typical Reformer." The action to prevent the intended celebration was brought by Mrs. Schuyler's nephew, in behalf of all her nearest relatives.

Judge O'Brien grants the injunction strictly on the ground that Mrs. Schuyler had never acted in other than a private character, and that such a person has rights which are lost by any one voluntarily entering public life. That no reported decision has hitherto gone so far in protecting the right to privacy Judge O'Brien freely recognizes; but he feels that the tendency to extend the law in the direction of affording the most complete redress for injury to individual rights makes the new step an easy one.

To believers in the practical utility of an increased scientific study of the general theories of law it will be interesting to notice that Judge O'Brien quotes at marked length from the article of Messrs. Warren and Brandeis, which he calls "an able summary of the extension and development of the law of individual rights, which well deserves and will repay the perusal of every lawyer," and which seems to be almost the basis of his decision that the right to which recent cases have been more and more, under various names, giving protection is the right to privacy.<sup>1</sup>

REVERSAL OF DECISION IN WATUPPA POND CASES. — It is interesting to note that the decision in the Watuppa Pond cases has been reversed on a rehearing. These cases, which were decided by the Supreme Court of Massachusetts in 1888, reported in 147 Mass. 548, are of great interest. The point decided — by a bare majority of four

<sup>1</sup> See 4 Harv. L. R. 193.

to three—was that the Commonwealth has the absolute right to the waters of our great ponds, free from any duties to the riparian owners on the streams forming the outlet; that it may grant to a city the right to take the water, and the lower riparian owners can claim no compensation for the consequent injury to them. For interesting articles on both sides of the question, see 2 *Harvard Law Review*, 195 and 316.

In view of the importance and difficulty of the question, it is a disappointment to find that on the rehearing the court expressly refuses to reconsider its decision, and bases the reversal solely on the fact, which is now made to appear for the first time, that the plaintiffs' predecessors acquired title to these ponds by a grant prior to the date when the Colonial Ordinance of 1647, on which the title of the Commonwealth to the great ponds is based, became law. The Ordinance could, of course, have no effect on the existing private ownership, and therefore the Commonwealth never acquired title to these particular ponds, and its grantee, the City of Fall River, is enjoined from taking the water.

The general principle laid down by the former decision, as stated above, remains, however the law of Massachusetts.

BOTH graduates and present members of the school will doubtless be interested to hear that the degree of LL.D. has recently been conferred upon Prof. James B. Thayer by the Iowa State University.

## RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the court. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

**ADMINISTRATORS—PERSONAL LIABILITY.**—An administrator recovered a judgment and, after appeal was barred, waived his advantage and allowed the same to be taken. The appellate court reversed the judgment, and refused a new trial, on the ground that the proof showed no cause of action. *Held*, that he was not obliged to insist on the technicality, and was not personally liable to the estate for the amount of the judgment. *McGuire v. Rogers*, 21 Atl. Rep. 723 (Md.).

The reasoning of the court is that an administrator is not obliged to insist upon or set up a legal right when justice does not require it. In accordance with this principle it is generally held that an administrator may waive the Statute of Limitations. The present case is interesting as indicating that the right to waive will be extended to other defences concerning which the law is as yet unsettled. See *Williams on Executors*, 7th edition, p. 1801; *Woerner's Law of Administration*, pp. 841, 843; 15 Mass. 8, note.

**AGENCY—FELLOW-SERVANTS—SEPARATE DEPARTMENTS.**—One who is employed by a railroad company, under a foreman, to make repairs in its repair-shops and on cars standing in its yards is not a fellow-servant of a switchman who, under orders of the yard-master, directs the movement of cars in the yard. *Pool v. Southern Pac. R. Co.*, 26 Pac. Rep. 654 (Utah).

**AGENCY—ORAL AGREEMENT TO EXCHANGE—PART PERFORMANCE—STATUTE OF FRAUDS.**—In an action for specific performance, the evidence showed that defendant placed the property in the hands of an agent to sell or exchange, and by his efforts met plaintiff, and agreed orally to exchange with him. Plaintiff left a deed with the agent, but defendant refused to accept it. *Held*, that a deliv-

ery to the agent was not a delivery to defendant so as to constitute part performance and take the agreement out of the Statute of Frauds. *Swain v. Burnette et al.*, 26 Pac. Rep. 1093 (Cal.).

**ASSIGNMENT—SALARY—PUBLIC POLICY.**—An assignment of the salary of the chaplain to a workhouse and workhouse infirmary is not void as being against public policy. *In re Mirams* [1891], Q. B. 594 (Eng.).

**CARRIERS—LIMITING LIABILITY.**—A stipulation by a carrier that he will be liable only to a limited amount, unless the true value of the goods is given, is valid, and will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, when the loss of the goods results only from slight, common, or ordinary negligence on the part of the carrier. *Pacific Exp. Co. v. Foley*, 26 Pac. Rep. 665 (Kan.).

This brings Kansas into the list of those States which allow a carrier to limit his liability. The rule there was formerly the other way. See *Kallman v. Express Co.*, 3 Kan. 205.

**CONSTITUTIONAL LAW—INTERSTATE COMMERCE—"WILSON BILL."**—The provision of the federal Constitution vesting in Congress the exclusive power to regulate interstate commerce does not guarantee the absolute freedom of such commerce; and hence the "Wilson Bill" (Act Cong. Aug. 8, 1890, 26 St. 313), which provides that intoxicating liquors brought into any State shall be subject to the laws enacted in the exercise of its police power "to the same extent and in the same manner as though such liquors had been produced in such State, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise," is not an unconstitutional restriction. *Wilkerson, Sheriff, v. Rahrer*, 11 Sup. Ct. Rep. 865.

**CONSTITUTIONAL LAW—RELIGIOUS LIBERTY—COMPULSORY ATTENDANCE AT COLLEGE CHAPEL.**—A rule of the trustees of the State university, requiring students to attend non-sectarian religious exercises in the university chapel is not in conflict with Const. Ill., art. 2, § 3, which provides that "no person shall be required to attend or support any ministry or place of worship against his consent." *North v. Board of Trustees of University of Illinois*, 27 N. E. Rep. 54 (Ill.).

**CONTRACT—DEMURRAGE—VIOLENCE OF STRIKERS.**—The contract by the freighter to pay demurrage to the ship-owner if the ship is not unloaded at the end of a fixed number of lay days is an absolute one, subject to the ship-owner doing nothing to prevent the unloading; and consequently delay in unloading caused by a strike of dock laborers over whom the ship-owner had no control will not relieve the freighter from his liability to pay demurrage. *Budgett & Co. v. Binnington & Co.*, 63 L. T. N. S. 742, Ct. of App. (Eng.).

**CONTRACT—PUBLIC POLICY.**—Where the public has an interest in the location of a public building, as a post-office, a contract to induce the retention of the building at a given point for private gain and benefit is against public policy, and unenforceable. *Woodman v. Innes*, 27 Pac. Rep. 125 (Kan.).

**CONTRACTS—WANT OF CONSIDERATION—FRAUDULENT CONVEYANCES.**—A conveyance of real estate by a father to a minor son, for the son's services during his minority, is a voluntary conveyance, without legal consideration, and therefore void as to the creditors of the parent, if made when the latter had no other property subject to execution. "The obligation rested upon the father to support the son, who, in turn, owed the father his services until he became of age." *Stumbaugh et al. v. Anderson et al.*, 26 Pac. Rep. 1045 (Kan.).

**CRIMINAL LAW—CONVICT—NEW SENTENCE.**—A convict who escapes from the penitentiary and commits a grand larceny may be convicted and sentenced therefor before he has served out his first sentence. *People v. Flynn*, 26 Pac. Rep. 1114 (Utah).

**CRIMINAL LAW—EVIDENCE—DEFENDANT AS WITNESS.**—A defendant who voluntarily becomes a witness on his own behalf is subject to the same rule as any other witness, and may be asked by the State, on cross-examination, if he had not been convicted of larceny at the previous term of the same court in which he was being tried. *State v. Probasco*, 26 Pac. Rep. 749 (Kan.).

**EMINENT DOMAIN—RELOCATION OF ROAD—LAND IN PUBLIC USE.**—Where, by its charter, a railroad company was authorized to alter the location of its

road, or make a new location in whole or in part: *Held*, that this was not a continuing right, and that the power so granted could not be exercised after the road had once been fully completed and put in operation. And, further, under a general power to condemn land for a right of way, a railroad company cannot seize land occupied by the tracks of another company, though the land was acquired by the latter by purchase and not by the exercise of the power of eminent domain. *In re Providence v. W. R. R. Co.*, 21 Atl. Rep. (R. I.) 965.

**EQUITY — NO RELIEF TO WRONG-DOER — LIMITS OF PRINCIPLE.** — The principle that he who comes into equity must come with clean hands does not apply to misconduct of complainant in no wise affecting the equitable relations between the parties, and not arising out of the transaction as to which relief is sought. *Foster v. Winchester*, 9 So. Rep. 83 (Ala.).

**HUSBAND AND WIFE — HUSBAND'S AUTHORITY.** — Where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights. *The Queen v. Jackson* [1891], Q. B. 671, Ct. of App. (Eng.).

**INSURANCE — A TRADE.** — A statute entitled "An Act to declare unlawful trusts and combinations in restraint of trade and commerce, and to provide penalties therefor," embraces the business of insurance, and its provisions as to insurance are covered by the title of the act. *In re Pinkney*, 27 Pac. Rep. 179 (Kan.).

**INSURANCE — ACCIDENT.** — "Sunstroke or heat prostration" contracted by the decedent in the course of his ordinary duty as a supervising architect is a disease, and does not come within the terms of a policy of insurance against bodily injuries sustained through "external, violent, and accidental means," but expressly excepting "any disease or bodily infirmity." *Dosier v. Fidelity Co.*, 46 Fed. Rep. 446 (Mo.).

**INSURANCE — INSURABLE INTEREST — HOUSE-MOVER.** — A person engaged in moving houses has an insurable interest in the houses which he is moving to the extent of the compensation which he is to receive. *Planters' & Merchants' Ins. Co. v. Thurston*, 9 So. Rep. 268 (Ala.).

**QUASI-CONTRACT — OFFICIOUSNESS — NO RECOVERY.** — Defendants' agent, after being instructed not to purchase any more goods for defendants, agreed with plaintiffs, who had knowledge of his instructions, to purchase a quantity of goods from them for defendants, surreptitiously put them among the stock and sell them, and procure payment from defendants, as he might be able to do, without their knowledge. The goods were so furnished and sold, the proceeds going to defendants. *Held*, that plaintiffs cannot recover for goods sold and delivered, as there was no valid sale. *Shuts v. Jordan*, 11 Sup. Ct. Rep. 906.

**PERSONAL PROPERTY — WAR PREMIUMS.** — Act Cong. June 5, 1882, providing for "the distribution of the unappropriated moneys of the Geneva award," directed the examination and allowance of claims for the "payment of premium for war risks . . . after the sailing of any Confederate cruiser." *Held*, that these claims, even before Congress had made any provision for their payment, were property, and as such passed, under Rev. St. U. S., § 5044, to the assignee in bankruptcy of the claimants, who accordingly is entitled to the amount ultimately awarded therein. Reversing 16 N. E. Rep. 437 (Mass.). *Williams v. Heard*, 11 Sup. Ct. Rep. 885.

**PERSONAL PROPERTY — GIFTS INTER VIVOS — DELIVERY.** — A writing signed and delivered, recited: "I give to the trustees . . . the principal of a note for seven hundred dollars . . . said sum of seven hundred dollars to be given in trust to the said trustees when the said note falls due." The note was not delivered. *Held*, that there was no gift *inter vivos*, but merely an agreement to give when the note became due. *Gammon Theological Seminary v. Robbins*, 27 N. E. Rep. 341 (Ind.).

This is in accord with *Irons v. Smallpiece*, 3 B. & Ald. 1511, which has been somewhat questioned, but is now settled law in England, *i. e.* that delivery is necessary to make a complete gift *inter vivos*. See *Cochrane v. Moore*, 25 Q. B. Div. 57. And see 4 Harv. L. Rev., p. 140.

**REAL PROPERTY — BEDS OF RIVERS.** — The State, by virtue of her sovereignty, is the owner of "the entire beds of all streams within her borders that

are in fact navigable by the public in the conduct of useful commerce thereon, whether the waters of such stream be salt or fresh, or whether the tides of the sea ebb and flow therein or not." *State v. Black River Phosphate Co.*, 9 So. Rep. 205 (Fla.).

This is a distinct departure from the English rule. It is, however, sustained by the weight of American authority.

**REAL PROPERTY—ESCROW—HAPPENING OF CONDITION.**—A deed in escrow becomes the deed of the grantee on the happening of the condition on which manual delivery should be made, and thereafter the depository is the mere agent or trustee of the grantee. *White Star Line Steam-Boat Co. v. Morange*, 8 So. Rep. 867 (Ala.).

**REAL PROPERTY—BOUNDARIES—LAKES.**—Where land is conveyed bounded by a lake or stream, the grantee takes to the centre. *Hardin v. Jordan*, 11 Sup. Ct. Rep. 808.

For the dissenting opinion of Gray, Brewer, and Brown, JJ., that where bounded by a lake he takes only to the water's edge, see 11 Sup. Ct. Rep. 838.

**REAL PROPERTY—COVENANTS IN DEEDS—RESTRICTIONS IN BUILDING.**—Where the grantees, in deeds prohibiting the erection of a building, or projections therefrom, within a certain distance of a street, deliberately erect such projections, with full knowledge of the prohibition, and of the opposition of the grantor, the Commonwealth, the attorney-general cannot be held guilty of laches in waiting until the erection is completed before taking steps for its removal. Nor can the grantees, after persisting in the erection, contend that the projections are not of sufficient importance to warrant a mandatory injunction or order for their removal. *Attorney-General v. Algonquin Club*, 27 N. E. Rep. 2 (Mass.).

**REAL PROPERTY—TELEGRAPH LINES—COMPENSATION TO ABUTTING OWNERS.**—A city cannot grant to a telegraph company the right to erect its line along a public street without first making compensation to the abutting property owners, since the line is an additional burden. *Stowers v. Postal Telegraph Cable Co.*, 9 So. Rep. 356 (Miss.).

There is considerable conflict of authority upon this point. See *West. Union Tel. Co. v. Williams*, 11 So. Rep. 106 (Va.), in accord with the principal case. For decisions the other way, see *Pierce v. Drew*, 136 Mass. 75, and *Julia Bldg. Ass. v. Bell Tel. Co.*, 88 Mo. 258. In most jurisdictions the point has not been passed upon by the courts.

**STATUTES—INTOXICATING LIQUORS—MINORS.**—A minor whose civil disabilities as such have been removed by a decree in chancery is still a minor within the meaning of statutes prohibiting sales of intoxicating liquor. *Coker v. State*, 8 So. Rep. 874 (Ala.).

**STATUTES—TERRITORIAL COURTS.**—Territorial courts, including the district court created for the district of Alaska, are not "courts of the United States," within the meaning of Rev. St. U. S. § 1768, which excepts judges of the courts of the United States from the authority therein given the President to suspend any civil officer appointed by and with the advice and consent of the Senate. *McAllister v. United States*, 11 Sup. Ct. Rep. 948.

**WILLS—ACCELERATION OF LEGACIES.**—A testator bequeathed his personal estate to his wife for life, and provided that at her death certain specific legacies should be paid, and the residue should go to certain relatives. The wife, having renounced the will, took one-half the personal property absolutely. Held, that the specific legacies were thereupon payable in full at once, the wife's renunciation being equivalent to her death. *In re Vance's Estate*, 21 Atl. Rep. 643 (Pa.).

**WILLS—SIGNATURE MUST BE SUBSCRIBED—FRENCH LAW.**—An olographic testamentary writing containing the caption, "Testament d'Aglæe Armant," but without signature at the end or following the testamentary dispositions, does not import such a signature as is required under the historical and rational interpretation of article 1583 of the Civil Code. The court said: "It is true that, in interpreting a like provision of the first English Statute of Frauds, an English court held that writing the name at the beginning of the testament supplied the absence of signature at the end; and some other courts, with that subjection to precedent which characterizes that system, followed the decision. But, though following it, some of the judges intimated that, if it were *res nova*, they would decide differently, and the doctrine was condemned by sound legists. And such was the prevalent dissatisfaction that an act of Parliament was passed

to amend the statute so as expressly to require the signature to be at the bottom of the testament." *In re Arman's Will*, 9 So. Rep. 50 (La.).

In view of the fact that it was found necessary in England to limit in turn the act of Parliament above referred to, and that a signature at the bottom of the will is not required in a majority of American jurisdictions, the criticism of the English law in the principal case seems unnecessarily severe.

---

## REVIEWS.

---

**SEDGWICK ON THE MEASURE OF DAMAGES.** Eighth edition, revised, rearranged, and enlarged by Arthur G. Sedgwick and Joseph H. Beale, Jr. Three volumes. New York: Baker, Voorhis, & Co., 1891. pp. xii and 1360.

The eighth edition of "Sedgwick on Damages," in three large volumes, is a striking proof that the measure of compensation is not what popular opinion thought it eleven years ago (the date of the last edition), but that, on the contrary, it is a real and important auxiliary of the substantive law of property. It is now recognized that damages is a right of property in another's goods, springing from the judgment of a court that the plaintiff has a certain interest in a part of the defendant's property.

Of the forty years that have elapsed since *Hadley v. Baxendale* was decided, the last decade has seen the greatest development of the theory of compensation, and it is because the editors have collected and codified the legal product of this period that their work is of such great value.

Mr. Sedgwick's necessarily unperfected book has been analyzed and rearranged, and the original text has been increased by a third, the result of the editors' long and patient investigations. The whole of the first volume, treating of the general principles of the law of damages, is practically new matter, the most valuable part being the discussion of compensation for mental injury and for breaches of contract relating to telegraphs and to passenger carriage. Not content with generalizing the results of recent decisions, the editors have endeavored in well-considered opinions to point out the tendencies of the present rules, and to declare what they consider to be the logical consequences of the judicial position of to-day on the question of compensation.

Sedgwick's book has long been recognized in England, as well as in America, as a legal classic; but the fact that former editions have contained American citations only has tended to confine its practical value to the United States. The addition, however, by the present editors, of all the important English and Canadian decisions will have the effect of greatly extending its use, so that in the future it will be limited only by the field of the common law. To every lawyer who has this edition of the old standard on his shelves there will be the possibility of a complete knowledge of the theory of the measure of damages as it is understood at the present moment.

---

**HISTORY OF THE LAW OF PRESCRIPTION IN ENGLAND.** By Thomas Arnold Herbert, B.A., LL.B., being the Yorke Prize Essay of the University of Cambridge for 1890. London: C. J. Clay & Sons, 1891. 8vo. pp. xxi and 210

While this book would be of little service to the practising lawyer, the student and those interested in tracing the historical development of the law will find it very useful. Besides dealing thoroughly with the subject from the historical standpoint, the writer discusses at some length many of the questions which arise upon this topic of the law. Many illustrative cases are cited, often with great fulness. The book is devoted exclusively to the law of England, as the title shows. The arrangement is systematic and the indexing thorough. [The class in Property II. will find in Chapter I. a very good discussion of the origin and growth of the "lost grant theory," in connection with the case of *Angus v. Dalton*.]

---

THE LAW OF ELECTRICITY. By Seymour D. Thompson, LL.D. pp. xl and 525. Central Law Journal Co., St. Louis, Mo., 1891.

This volume, as the author says in his preface, is an attempt to state and classify the adjudged law applicable to Telegraphs, Telephones, Electric Lights, Electric Railways, and other Electrical Appliances. The growing popularity of the electric current as a means of facilitating travel and communication of all kinds, has necessarily brought with it an endless flow of litigation of an entirely novel character. Though several treatises on the law of telegraph and telephone companies are in existence, no attempt has been made to collect the authorities and state the law in regard to other electrical appliances until now. The book therefore should find favor with the profession. It is also of value as containing the latest authorities on the subject of telegraphs and telephones. The elaborate and detailed table of contents is not the least valuable portion of the book; it covers twenty-one pages, and is a well-arranged and exhaustive summary of the remainder.

---

A TREATISE ON THE LAW OF PERSONAL PROPERTY. By Joseph J. Darlington, LL.D., of Georgetown University College of Law. Founded on the treatise of Joshua Williams, Esq. Philadelphia: T. & J. W. Johnson & Co., 1891. pp. 469.

Mr. Darlington in this work has followed Mr. Williams exactly in the division of the subject, treating it under the same head and arranging the subdivisions in the same order. Modern English statutory provisions and such parts as were of value to English lawyers, but of little value to the bar of this country, have been omitted, and the American law on the subjects treated in the foot-notes of the last edition of Williams, together with many topics not considered at all in that book, is given in the body of the work.

As stated in the preface, "every paragraph, with inconsiderable exceptions, the references in which are exclusively to English authorities, is the unchanged text of Mr. Williams. All paragraphs containing both English and American citations, or the latter only, are wholly new." The chapter on Ships and the one on Patents, Trade-marks, Prints and Labels, and Copyright are entirely new, and both have been carefully prepared. The former is the work of Martin F. Morris, LL.D., Professor of Admiralty in the Law School of the Georgetown University, and the latter was written by Robert G. Dyrenforth, LL.D., late Acting Commissioner of Patents.



The work is a "thoroughly Americanized treatise on the subject of personal property," and, with the standard works of Mr. Williams as a foundation, it cannot fail to be of great value to both students and practitioners.

The work of the publishers is well done.

---

STUDIES IN CONSTITUTIONAL LAW. By Émile Boutmy. Translated from the French, by E. M. Dicey. Macmillan & Co., New York, 1891. 12mo. pp. xi and 183. Price, \$1.75.

The title of this book is misleading. It does not treat of constitutional *law* from the standpoint of a lawyer. It is rather a theoretical discussion of constitutional *government*. The book is made up of three essays. The first contains a discussion of the nature and origin of the English constitution. The second deals with the constitutional government of the United States in the same way. The third is a comparison of the conceptions of sovereignty in France, England, and the United States, as illustrated by their constitutions. The book has no place in a law library as such. To those interested in theoretical as distinguished from practical ideas of government, it will prove interesting. Two editions of the original have already appeared in France.

---

THE INTERSTATE COMMERCE LAW ANNOTATED. By John Theo. Wentworth. Chicago: T. H. Flood & Co., 1891. pp. xxiii and 114.

This little volume is intended, as the preface states, to serve the purpose of conveying to such as are interested in the "act to regulate commerce" a rapid understanding of its practical workings. Each section of the law as amended is followed by short statements, alphabetically arranged, of the points made and constructions given by the Commission relative to the subject-matter of the particular section. Then the volume is completed by copies of the rules and forms adopted by the Commission, a table of cases and subjects, and an index.

This modest attempt to present in a convenient form the Interstate Commerce Law as it stands to-day appears to be carefully worked out. While, except as a foundation upon which to build, the volume can be of little permanent value, since so much of the act still requires judicial construction, yet for a time at least the railway lawyer, rate-maker, and shipper will be likely to find here "a speedy answer to many annoying questions, and a guide to direct him to more elaborate discussion of the subjects upon which light is sought."

---

BLACK'S LAW DICTIONARY. By Henry Campbell Black, M.A., author of treatises on "Judgments," "Tax Titles," "Constitutional Prohibitions," etc. St. Paul, Minn.: West Publishing Co., 1891. pp. x and 1253.

The first canon of lexicography relates to substance: A dictionary must be comprehensive; the second, to form: A dictionary must be convenient.

In respect to the first consideration, Mr. Black's dictionary will not satisfy those who look for a fairly complete statement in a law dictionary of the more fundamental and well-settled points of law collected under the words to which they relate. Mr. Black indeed distinctly disavows

any intention of compiling a dictionary of such character. He says: "It does not purport to be an epitome or compilation of the body of the law."

Agreeably to Mr. Black's plan we find the definitions brief, lists of authorities not numerous, and examples rare. On the other hand, the comprehensiveness of the work in respect to the number of words and phrases defined would elicit praise from the most exacting and give the work high value. The aim was to include all words defined in any law dictionary, and this, we believe, has been done.

In respect to the second consideration, assuming that the sole function of a law dictionary is to define, this work stands the tests of form. In accuracy of definition and in style it compares favorably with the established lexicons. Its large size is more than made up for in the remarkably large type and generous spacing. A thumb index at the edge and alphabetical guides on both margin and cover are further contributions of the publisher to the convenience of the volume. The more usual method of distributing maxims alphabetically has been followed.

---

## LEADING ARTICLES IN EXCHANGES.

---

**The Green Bag.** Vol. 3. Boston Book Co.

No. 9. Lord Selborne (with portrait). Some singular Tenures. Legal Notes on Card-Playing (N. T. Horr). The Supreme Court of New Jersey. II. (J. Whitehead.) The Law and Authors in the Olden Time.

**Albany Law Journal.** Vol. 44. Weed, Parsons, & Co., Albany.

No. 15. Avoidable Causes of Delay and Uncertainty in our Courts. The Justices of the Peace in England.

**American Law Review.** Vol. 25. Review Publishing Co., St. Louis, Mo.

No. 5. A Summary of Quasi-Contracts. The Decisions of the Comptrollers. Is Unpaid Capital a Trust Fund in any Proper Sense? Land Transfer and Registration of Titles.

**Political Science Quarterly.** Vol. 6. Ginn & Co., N. Y.

No. 3. Efforts at Compromise. The North German Confederation. Economics in Italy. Railroad Stock-Watering. The Writ of Certiorari. General Booth's Panacea.

**Chicago Law Journal.** Vol. 2. N. S.

No. 9. American Bar Association. Constructive Assignments.

**Criminal Law Magazine.** Vol. 13. F. D. Ginn & Co. Jersey City.

No. 5. The Power of the Sovereignty to Regulate the Conduct of Citizens toward each Other.

**Canada Law Journal.** Vol. 27. J. E. Bryant Co. Toronto.

No. 15. Dower in Mortgaged Estates. Judicial Salaries. Legal Statistics for 1890.

**Washington Law Journal.** Vol. 19. Washington, D. C.

No. 41. The Clitheroe Case. Executory Contract for Performance of Personal Services by a Lawyer not Assignable. Rescission or Compensation — Knotty Problem presented for Solution.

**Scottish Law Review.** Vol. 7. Glasgow. No. 81. John Inglis.

**Law Journal.** Vol. 26. London.

No. 1341. Tenants holding over. *English Causes Célèbres*. 6. *Reg. v. Newman*.

**Law Times and Solicitors' Journal.** Vol. 25. Dublin.

No. 1287. Judgment against Husband as a Bar to an Action against Wife.

# HARVARD LAW REVIEW.

---

VOL. V.

NOVEMBER 15, 1891.

NO. 4.

---

## A RECENT DECISION OF THE SUPREME COURT UPON MUNICIPAL BONDS.

---

FOR more than a third of a century, the Supreme Court of the United States, aside from questions of constitutional law, has been dealing with no single class of cases, it is safe to say, of greater moment to the growth and material prosperity of the country than controversies between the holder of a negotiable bond and the State or municipal corporation which, after the security had been put upon the market in its name, has for one reason or another seen fit to deny its validity, and to refuse to pay the indebtedness it purported to secure. The municipal coupon bond, as everybody is aware, has played a conspicuous, one may say indispensable, part in the development of our cities and towns, more especially throughout the West. Coming into use from necessity, it has proved to be an instrument singularly well adapted to take the capital of those who have saved their earnings, and to set it at work in distant localities, where needed to build railroads, bridges, court-houses, school-houses, sewers, water-works, and the like improvements that a rapidly growing community requires. A thousand-dollar bond held by a savings institution has not unfrequently represented the aggregate savings of several depositors, whose small deposits are thus enabled to earn a good rate of interest. It will hardly be denied that this form of security has been a convenient, and upon the whole a safe, means of accomplishing

its twofold object. True, its wide-spread adoption led to some serious abuses, where towns were bonded in aid of railroads, or in a few instances to develop private enterprises; but in the main, the bond itself, as a means of lending capital, has been a blessing alike to the borrower and to all classes of people who sought for their savings a secure investment yielding a good return.

The feeling of confidence that constituted these bonds in the true sense of the word "securities" is largely, if not wholly, due to the attitude towards them taken from the beginning by the Supreme Court of the United States.

The decisions of this tribunal upon the validity of these bonds, beginning with the Commissioners of Knox County (Indiana) *v. Aspinwall*,<sup>1</sup> at the December term, 1858, have been numerous. Indeed, there has scarcely been a term of the court down to the present time that has not witnessed the disposition of one or more causes of the kind, until it would seem as though every possible phase of litigation in this regard had been fully explored. It is hardly needful to add that the system thus gradually developed reflects honor upon American jurisprudence. The opinions of the eminent justices have been pronounced in terms clear and unmistakable; and so far as such a statement can be made without danger of misapprehension, it is to be said that in cases where the regularity of the issue was contested, the court has steadily tended towards upholding the bond. Upon a few points, such as the want of power to issue, and the like, the justices have from time to time divided; but to the extent that the rights of a *bona fide* holder were concerned, or absolute good faith on the part of the nominal debtor required, the views of the court have uniformly been of no uncertain character. Wherever it has found a contract to exist, it has gone to the utmost length to sustain the obligation of it as sacred and inviolable.

There is, and perhaps there always will be, more or less loose talk to be heard through the newspapers in denunciation of "bondholders," and of the Supreme Court of the United States as favoring that class of creditors. As justly might that august body be accused of favoring "plaintiffs," or favoring "defendants." Judges, of course, have human sympathies. Political questions give birth to public opinion more or less intense throughout the community. Public opinion, we freely concede, may not exist without exerting

---

<sup>1</sup> 21 Howard, 539.

some slight degree of influence upon the mind of even the most scrupulous magistrate that holds the scales of justice. But that the highest court in the land has consciously yielded a hair's breadth to other considerations than such as have been addressed in the usual manner at the bar logically to their understandings, is a proposition on its face too absurd to be refuted. As we look back over the record, we can plainly see that the firm moral fibre displayed in the opinions upon bond cases has been of incalculable value to the whole country. Whatever hardship may have resulted from individual decisions, the sum total of the court's labors in this department stands as an enduring monument, for which our people can never be too profoundly grateful.

With these observations premised, let us briefly examine the opinion of the court in a decision rendered at the last term, with a view to ascertain whether there be not just ground for surprise at the line of reasoning there adopted. The case referred to is *Merrill v. Monticello*, decided March 2, 1891, and reported in 138 U. S. 673. The facts are substantially as follows: —

Plaintiff, a citizen of Massachusetts, bought in open market one hundred and forty-three funding bonds of the town of Monticello, Indiana, of \$100 each, dated May 20, 1878, payable to bearer ten years from date, with seven per cent. interest per annum, principal and interest payable in New York. The bond recited that it was one of a series of \$21,000, authorized by the town by an ordinance passed by the Board of Trustees, May 13, 1878, for the purpose of funding the indebtedness of the town. Coupon numbered two not being paid on presentation, plaintiff, availing himself of the terms of the bond, elected to declare the principal sum due, and brought suit.

The town, May 1, 1869, had issued \$20,000 worth of ten per cent. school-bonds, payable in ten years. This amount represented the only debt of the town, and the bonds in suit were issued to take up the school-bonds.

The ordinance, passed after a petition had been presented to the Board of Trustees by the owners of taxable property in the town, was in the following words: —

“That said town issue bonds in the sum of twenty-one thousand dollars, in denominations of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said town. And be it further

ordained, that when said bonds are issued they be placed in the hands of J. C. W., a member of the Board of Trustees, for negotiation and sale. And be it further ordained, that said bonds shall not be sold at a price less than ninety-four cents on the dollar."

At the date when the bonds in suit were issued, the town treasury had \$3,047.85 and no more as a special fund to pay the \$20,000 ten per cent. school-bonds then outstanding and about to mature. By law a sufficient sum to pay that indebtedness could not have been raised before their maturity, on the taxable property of the town. The funding bonds were delivered to J. C. W. (a member of the Board of Trustees) for sale. He sold those on which this suit was brought, to a firm in Indianapolis, converted the proceeds to his own use, and fled the country. The town subsequently recovered \$6,988.43 from a bank in which J. C. W. had a deposit. It also recovered judgment against the sureties on J. C. W.'s official bond; but the judgment was reversed on appeal, and a new trial ordered. The town later dismissed its suit.

Plaintiff bought his bonds in Boston, as an investment, with no notice of any irregularity as to their issue.

A demurrer to the answer was overruled by Judge Gresham, on the ground that the town had no power to issue bonds to fund its indebtedness.<sup>1</sup>

A demurrer to plaintiff's reply was overruled by Judge Woods, who upheld the validity of the bonds.<sup>2</sup> Upon a trial before the two judges, waiving a jury, judgment was for defendant. No certificate of division was given, but Judge Woods subsequently granted a new trial, it seems, *pro forma*, to allow the case to be taken to the Supreme Court. He filed certain findings of fact, and entered judgment thereon in favor of the defendant. The writ of error was argued before six of the justices in December, 1890, the Chief Justice and Mr. Justice Brewer not sitting. Mr. Justice Brown was not at that date a member of the court.

The opinion by Mr. Justice Lamar delivered, as already stated, March 2, 1891, opens as follows: —

"The decisive question presented by the record in this case is — Did the town of Monticello have authority, under the laws of Indiana, to issue for sale in open market negotiable securities in the forms of the bonds and coupons on which recovery is here sought?"

---

<sup>1</sup> 14 Federal Reporter, 628.

<sup>2</sup> 22 Federal Reporter, 589.

The opinion then proceeds to speak of the necessity of holding municipal corporations within strict limits of authority, and very properly quotes to that effect from Judge Dillon's work on Municipal Corporations, as well as cites the decision of that able jurist in *Gause v. Clarksville*, 5 Dillon, 165. It quotes extracts from the State statutes, of which the most material is section 27 of the Act of 1852, for the incorporation of towns, being section 3342 of the revised statutes of Indiana, as follows:

"No incorporated town under this Act shall have power to borrow money or incur any debt or liability, unless the citizen-owners of five-eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the Board of Trustees to contract such debt or loan; and such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same; and for any debt created thereby, the Trustees shall add to the tax duplicate of each year, successively, a levy sufficient to pay the annual interest on such debt or loan, with an addition of not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof."

The learned justice then reaches the conclusion that no "express power is given by these sections, either for the purpose of raising money or funding a previous indebtedness."<sup>1</sup>

Continuing to examine the question whether the bonds were authorized by legislative authority, Mr. Justice Lamar remarks: —

"The town had no power to pay off those bonds in this way, viz., by the issue of new bonds, or it could perpetuate a debt forever. Bonds once issued for a lawful purpose must be paid by taxation. This is manifest from the provision which requires a tax to be levied each year, 'sufficient to pay the annual interest, with an addition of *not less* than five cents on the hundred dollars to create a sinking fund for the liquidation of the principal.' When bonds are once issued for lawful purposes, the town is *functus officio* as to that matter. To argue that the old bonds are a debt for school purposes which may be liquidated by new bonds is a refinement of construction which the sound sense of the law rejects."<sup>2</sup>

---

<sup>1</sup> Page 684.

It appears that on the 24th August, 1879, an act went into effect expressly conferring power upon towns to fund their indebtedness by issuing negotiable bonds — a date subsequent to the issue of the bonds in this suit.

<sup>2</sup> Page 685.

This language looks very much like deciding that an express power conferred to issue bonds for the special purpose of building a school-house, or purchasing land for school purposes, does not extend to a funding of the indebtedness thus created, so as to authorize the issue of funding bonds to meet and pay off that indebtedness. But inasmuch as the plaintiff appears to have rested his case mainly upon the broader rights that flow from a power to borrow money, and since the opinion treats this latter position as the turning-point upon which to dispose of the case, it is apparent that the views just presented ought not to be taken as binding the court further than the special circumstances of this case warrant.

The question of the power to issue a funding bond as incident to a power originally conferred to create the debt may thus, we think, be said to remain as yet undecided by the Supreme Court of the United States. As a matter of fact, the point does not appear to have been fully argued or fully considered by the court. Inasmuch as funding bonds in most instances are issued under the authority of a special act of the legislature, or under a general law authorizing towns to fund their indebtedness, the precise question is perhaps not likely to come before the court for determination.

The plaintiff's counsel relied mainly upon an implied authority in the town of Monticello *to borrow money* for meeting its maturing bonds. The existence of such a power, they contended, was settled law in Indiana. They cited Dillon on Municipal Corporations, and, among other authorities, the following language from the opinion of the court in the *City of Richmond v. McGirr*:<sup>1</sup>—

“We think the doctrine is well established in this State, that corporations possess all the necessary incidental powers to carry into full operation all their expressly granted powers, and for such purposes may legally execute commercial paper, such as negotiable bonds, in the absence of any restriction in their charter or fraud in the parties.”

Plaintiff also relied upon the principle recognized in *Claiborne County v. Brooks*,<sup>2</sup> as stated by Bradley, J.:—

“It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various polit-

---

<sup>1</sup> 78 Ind. 198.

<sup>2</sup> 111 U. S. 410.



ical and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

Of the soundness of these propositions the court appears to have been fully satisfied. We quote:—

"Section 119, Dillon on Munic. Corp., 3d ed. lays down the Indiana law on this subject substantially as is contended for by the plaintiff in error. That section is as follows: 'In *Indiana*, the doctrine is that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt. It is a power incident to corporations, in the absence of positive restriction, to borrow money as means of executing the power.' A large number of cases from the Supreme Court of Indiana is cited in a note to support the doctrine of the text. We think the proposition that, under the laws of Indiana, a town has an implied authority to borrow money or contract a loan, under the conditions and in the manner expressly prescribed, cannot be controverted."<sup>1</sup>

Here is the judicial conclusion that the town of Monticello had the authority *to borrow money*. "But," argues the learned justice, "this only brings us back to the question, Does the implied power to borrow money or contract a loan carry with it a further implication of power to issue funding negotiable bonds for that amount, and sell them in open market as commercial paper? Let us see."<sup>2</sup>

The opinion then proceeds to show that section 3342 is a limitation of the power to borrow money, and that it prescribes certain conditions, one of which is that the prayer of the petition shall be that the Board of Trustees "contract such debt or loan:—

"The board could not depart in its action from this legally required prayer of the petition without transcending its authority and acting *ultra vires*. But the board did depart from the prayer, for it did not borrow money nor contract a loan; but it ordained in so many words that the town issue bonds for negotiation and sale at not less than ninety-four cents on the dollar."<sup>3</sup>

It is to be noted that the third finding of fact sets forth the

---

<sup>1</sup> Page 686.

<sup>2</sup> Page 686.

<sup>3</sup> Page 686.

presentation of a petition "praying for the issue of bonds of said town." Then follows the petition *in totidem verbis*.<sup>1</sup> The circumstance is significant as indicating that the court below considered the expressions "to contract a loan" and "to issue bonds" as practically convertible terms. The substitution of one for the other in the finding was probably an inadvertence.

This then appears to be, in the judicial mind, the turning-point of the case. We have the conclusion announced that a power in a town to "borrow money," or to "contract a loan," does not authorize the town to issue its negotiable bonds as a means of getting the money. It is this result which we meant by intimating that the line of reasoning adopted in this opinion might excite surprise. With all deference to so high an authority, we are unable to regard it as a logically sound position.

The usual and customary mode of borrowing money in any considerable sums by municipal corporations has been for years to issue negotiable bonds. Such is the universal understanding, we venture to say, of the business community; and such, so far as we have been able to consult the authorities, has been the construction of the courts. Says the Supreme Court of Indiana, "The issuing and sale of bonds in the market, is the most usual and ordinary method adopted by corporations to borrow money."<sup>2</sup>

So well is this understood that, in a case in Pennsylvania, the court characterized an objection that "to issue bonds" was not "to borrow money" as "a mere quibble in words."<sup>3</sup>

"To borrow money," therefore, is a term that has, through the practice of a long series of years, acquired a perfectly well-settled meaning. Business men who know from experience the needs of a municipality, and the customary means of conducting its affairs, are not at a loss to understand what is meant by an authority conferred upon a city or town to borrow money, or to contract a loan. Thus far, in the opinion of the distinguished justice, we are afforded no reason whatever why, at this late day, the ordinary

---

<sup>1</sup> Page 678.

<sup>2</sup> *Thompson v. City of Peru*, 29 Ind. 305.

<sup>3</sup> *Middletown v. Alleghany Co.*, 37 Pa. St. 241.

"To say inferentially that the issuing of bonds was not to borrow money, is to trifle with language which the usages of business have rendered perfectly definite. Everybody knows that when a municipal corporation or a county obtains legislative authority to subscribe for stocks and borrow money to pay therefor, the legislature means that they are to issue a marketable bond in exchange for the stock subscribed." Per Woodward, J.

understanding in such cases should be set aside, and the official action of a board of trustees, which had been taken in good faith and at the request of citizen-owners of five-eighths of the taxable property of the town, should be denied to be, what it is likely everybody supposed it was at the time — a borrowing of money, or the contracting of a loan.

But we may look further on for the reasons on which this position is bottomed. The opinion continues: —

“It is admitted that the power to borrow money, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness, by the corporation, to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and, perhaps most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuing and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a sale, is not so in fact; and that the so-called purchaser who takes the bond and advances his money for it is actually a lender, as much so as a person who takes a bond payable to him in his own name. We think the case of *Police Jury v. Britton*, 15 Wall. 566, is directly and absolutely conclusive against the position of the plaintiff in error, on this point.”<sup>1</sup>

Is there a marked legal difference between the power to give a note to a lender, and the power to issue a bond and sell it in open market? We are inquiring now of the *power* to do these acts, not as to any legal difference that may exist in the respective rights of one who becomes a creditor because he has sold goods to the town, or advanced it money as a loan, — taking a note therefor, — and one who is a creditor because he has bought a bond of the town.

We know nothing of the history of this litigation save as it appears from the record, but upon the first reading of the opinion there was left upon our mind a dissatisfaction, which has only deepened, now that we have come to bestow upon it a closer study. The great ability and the perfect judicial fairness of the

---

<sup>1</sup> Page 687.

eminent justice who here speaks for the court, render it all the more important that the bar should pass respectful criticism upon the doctrine advanced. This supposed legal difference, upon which Mr. Justice Lamar lays so much stress, was the subject of argument below. The views of the District Judge (Woods) are, in our judgment, so sound, and his reasoning so clearly and forcibly put, that we cannot do better than to quote as follows from his opinion: —

“Having concluded that under the circumstances the town had the right to borrow, we come to the question whether or not the bonds in suit were issued in the lawful exercise of that power. The argument for the defense, as we have seen, turns upon the supposed difference between a power to issue bonds to a lender and a power to issue them for sale in the market. It is conceded, for the purpose of the argument at least, that the power to borrow existed, and that from that an implied power arose to issue negotiable securities to the lender; but it is insisted that this differs essentially from a right to put the bonds of the town upon the market for sale. If there be a difference legally, in what does it consist? When a town would borrow money, how shall it find the lender? Manifestly, from the power to borrow and the implied power to give the ordinary forms of obligations arises the further implication of right to seek the lender; and in the absence of restriction in that respect, to seek him in whatever reasonable manner and place he may be found, whether in the banks, on the boards of trade, or elsewhere. And since, in any case, the town must act by an agent, I see no reason, except of policy not affecting the question of power, why it may not send its agent with bonds duly prepared for delivery, to be disposed of to any who, upon the prescribed terms, will take them. In common parlance, and sometimes in the language of legislative enactment, this is called a *sale*; but it is a misnomer. It is an issue or execution of the bond, and the purchaser (so called) is a lender in fact, since, strictly speaking, a person, or corporation, cannot sell his own obligation. Until delivered to the other party, it is not an obligation, and only when delivered, whether to the highest bidder in open market, or to the taker found in any other way and place, does it become effective and binding; and he who receives it and pays, or rather surrenders, his money for it is a lender, not distinguishable legally from one who takes a bond payable to him in his proper name. Wherefore, as it seems to me, the alleged distinction between the conceded power and the power exercised is not substantial; neither is it justified by the cases cited in support of it.”<sup>1</sup>

---

<sup>1</sup> 22 Federal Reporter, 594.

The decision in *Police Jury v. Britton* was that a power to issue negotiable securities ought not to be implied from a mere authority to make improvements. This is sound doctrine; and it was followed in *Claiborne County v. Brooks*, where it was held that a statute of Tennessee conferring upon counties the power to erect a court-house, jail, and other necessary county buildings, did not authorize the issue of negotiable bonds in payment for the work.<sup>1</sup> The court in these decisions, however, was not dealing with the question of the meaning of the power to *borrow money*; for it expressly denied the existence of such a power. One needs but turn to the report of *Police Jury v. Britton* to perceive that the reasoning of the learned and acute judge who delivered the opinion, is based upon the proposition that there was no power in the police jury to borrow money. Mr. Justice Bradley expressly says: "It has been held that the power to borrow money implies the power to issue the ordinary securities for its repayment, whether in the form of notes, or bonds payable in future."<sup>2</sup> The same eminent justice, in *Claiborne Co. v. Brooks*, says of *Lynde v. County of Winnebago*:<sup>3</sup>—

"The county had express authority to *borrow money* for the erection of public buildings, to be determined by the people of the county at any regular election, or special election called for the purpose. The question in the case was, not as to the existence of the power, but as to the effect of the evidence on the question whether the conditions for its exercise had been complied with. The court held that the evidence was sufficient, and sustained the bonds. It was not pretended that the county would have had power to issue them if such power had not been conferred by the legislature, either expressly or by necessary implication, from the express power to borrow money."<sup>4</sup>

Mr. Justice Lamar, after citing several decisions and giving extracts from the opinions of the court, sums up by saying: "The logical result of the doctrines announced in the above-cited cases, in our opinion, clearly shows that the bonds sued on in this case are invalid." But an examination of the authorities thus relied upon shows that the court in each instance was passing upon the power to borrow money, and it found that such power did not

---

<sup>1</sup> 111 U. S. 400.

<sup>2</sup> 16 Wall. 6.

<sup>3</sup> 15 Wall. 572.

<sup>4</sup> 111 U. S. 409.

exist. Here the power to borrow money and contract a loan is not denied.

The opinion, repeating what it has previously said, continues:—

“It does not follow that, because the town of Monticello had the right to contract a loan, it had therefore the right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case all that can be contended for is, that the town had the power to contract a loan under certain specified restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality.”<sup>1</sup>

At last we are given a reason for denying the existence of a power to issue the bonds in question. It is because its existence *is not necessary to carry out any of the purposes of the municipality*. In a subsequent paragraph it is said that such power must be *indispensable* to the exercise of the express or implied powers conferred upon the town by law.<sup>2</sup>

Such a test as this is new, if we mistake not, and goes far beyond what has hitherto been the doctrine of the Supreme Court. Certainly it will be admitted that no one upon the bench has, since the decision in *Police Jury v. Britton*,<sup>3</sup> more firmly and consistently denied to municipal corporations a power to issue negotiable bonds, unless in cases where the authority is beyond question, than the learned justice who wrote the opinion in that case. Yet Mr. Justice Bradley, in 1883, speaking of mere political bodies such as counties constituted for local police and administration, took occasion to remark that they have no power to make or utter commercial paper, “unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, *which cannot fairly be exercised without it*.”<sup>4</sup> And his language is cited with approval by Mr. Justice Lamar.<sup>5</sup>

---

<sup>1</sup> Page 691-2.

<sup>2</sup> Page 693.

<sup>3</sup> *Ut sup.* (1872).

<sup>4</sup> *Claiborne v. Brooks*, 111 U. S. 407.

<sup>5</sup> Page 690.

The opinion we are now reviewing does not abide by this just limit. It virtually asserts the doctrine that although there be conferred upon a municipal corporation a power to borrow money, such corporation has no power to raise the money by selling its bonds, because raising money in that way is not necessary to carry out the purpose of borrowing. It is not indispensable to the exercise of the power of contracting a loan that the town should issue bonds. Of this necessity the municipality itself may not judge, but it is left for a court to determine, in an action upon the bonds.

With great respect let it be said, we find ourselves unwilling to believe that the reasoning can be sound which leads to such a result. It is hardly worth while to speculate whether, upon the application of so rigid a rule, the large majority of those familiar with municipal affairs would not be of opinion that under the circumstances in which the town of Monticello found itself, the issuing of its bonds for sale in open market was, as a matter of fact, necessary and indispensable to carry into execution the power that the town had to borrow money. It is of the terms of the rule as a legal proposition, however, not of its application in this particular case, that we complain.

We may be pardoned for suggesting that while the opinion does not directly say so, it yet conveys an impression that to the mind of its writer an implied power to borrow money, or contract a loan, is not quite so plenary in its scope as an authority to do these acts conferred in express words. It is hardly necessary to explain that the only real difference between the two is in the evidence that has satisfied us of the existence of the power. In the one case the legislature says to the town, "You may borrow money." In the other it has used such terms that the court says, "The legislature means that you may borrow." It comes to the same thing. We know of no reason why precisely the same test should not be applied to the power to borrow money, whether the power be express or implied. The true question is, Can a town fairly exercise its power to borrow without resorting to bonds? Inasmuch as negotiable bonds are, and for years have been, the usual and regular mode by which a town raises money that is too large in amount to be got by immediate taxation, there can properly be but one answer to the question. In a word, the

power of a town to borrow once established, its right to issue and sell bonds for a legitimate municipal purpose follows.

Again, although the opinion concedes the existence in Indiana of an implied authority to borrow money, much space is thereafter taken up with demonstrating how salutary is the doctrine that recognizes no such power unless expressly conferred, and how many and great are the dangers that attend a loose construction of the express powers of a municipal corporation.<sup>1</sup>

At page 692, the learned justice quotes at length a passage from Dillon's *Municipal Corporations*,<sup>2</sup> every word of which is replete with good sense. But the danger against which this admirable writer has sounded a timely warning is of a loose construction that admits of an implied power in a municipal corporation "to borrow money." Judge Dillon says: "We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and *incidental* to that the power to issue commercial securities." Judge Dillon was unquestionably right in long ago taking this stand. It is the implied power to borrow that is dangerous, because, such a power once recognized, the right to issue negotiable securities as incident thereto cannot logically be denied.

In conclusion, we submit that an adequate discussion of the principles governing this case would seem to require the consideration of but two questions only: —

*First.* — Does the power exist in the municipal corporation to borrow money?

*Second.* — Has a municipal corporation, which is empowered to borrow money, the right to issue negotiable bonds for funding a valid indebtedness that is about to mature, and which it has not the means to pay, except by borrowing money?

The first question the opinion answers, as we have seen, by determining that the power does exist. After that conclusion is reached, does anything further remain than to inquire into the extent and limits of the power to borrow? And should not that

---

<sup>1</sup> The reasoning of Mr. Justice Lamar, when scrutinized, is seen to bear exclusively upon the proposition that the power to borrow money cannot be implied from this or that express power. But (and the comment is obvious), that such a power must be necessary in order to be implied will not be disputed.

<sup>2</sup> 3d ed. sect. 507



inquiry be free from all consideration of the objections that may be urged against implying the power to borrow, where it does not exist by virtue of express legislative sanction? Pursuing this course, would the court have had any difficulty in determining whether a power in a small town to contract a loan and promptly raise \$21,000 could be "fairly exercised" without resorting to the customary methods, and putting its bonds upon the market?

"So far as this case is concerned," say the court in *Douglass v. County of Pike*, speaking through Chief Justice Waite, "we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put upon the market."<sup>1</sup>

Mindful of this just principle, it seems unfortunate, to say the least, that a power upheld without hesitation by the highest court of Indiana, at the time the town of Monticello voted to borrow the means whereby to preserve her credit, should be declared not to have existed, by the Supreme Court of the United States, under a new doctrine; and that the purchaser of these bonds, who had apparently the best of reason to regard them as unimpeachable, is now told that his supposed securities are worthless.

*Frank W. Hackett.*

WASHINGTON, D. C.

---

<sup>1</sup> 101 U. S. 687.

## JUDICIAL LEGISLATION: ITS LEGITIMATE FUNCTION IN THE DEVELOPMENT OF THE COMMON LAW.

---

THE phrase "judicial legislation" carries on its face the notion of judicial usurpation. It is habitually used by our courts with this sense of reproach. The same disapproval is apparent when Bentham, expressing theories very different from those of the judges, designates the whole common law as "judge-made law." But if judicial legislation be understood to mean the growth of the law at the hands of the judges,—and it is in this sense that the term will here be used,—it will not do to assume that it is merely an evil. I shall endeavor to show, on the contrary, that it is a desirable, and indeed a necessary, feature of our system. The subject will be discussed in the following order: (1.) Certain questions in regard to the nature of law, and the bearing of these questions upon our topic, will be first considered. (2.) Some characteristic features of the common law will be examined, with a view to showing that growth at the hand of the judge is a necessary consequence of its methods of reasoning, its mode of dealing with cases, and the machinery by which its operations are carried on. (3.) It will then become important to observe that the same features of our system which bring about this result in the common law lead also to judicial growth in the application of statute law. (4.) These considerations will furnish a basis for certain conclusions in regard to the question of this essay, namely, the proper function of the judge in the development of the law.

I. The nature of law, a question which underlies the whole philosophy of jurisprudence, is far beyond the reach of this essay. It is, however, so connected with the subject of judicial legislation that to clear the ground for a proper understanding of the latter, notice must be taken of certain leading opinions on the deeper question. It is indeed impossible to deal intelligently with the present topic without some consideration of the terms "law" and "legislation."

For the definition of law which is generally accepted at the

present time we must look to the so-called "Analytical Jurists," of whom Bentham and Austin are the most distinguished. A law, according to Austin, is a general command issued by the sovereign power in any state to political inferiors, and enforced by a sanction. No rule, whatever its nature, is properly called a law if it lacks any of these essential features. The type of law in this sense is written statute law, the express command of the sovereign. A body of customary rules, such as the common law, is brought within the definition by the maxim that what the sovereign permits he commands. The judge who administers the common law is regarded as the sovereign's agent, with a delegated power of oblique legislation. He has authority to legislate "as properly judging," and thus to convert into law the custom, which until so recognized is, in the disrespectful language of a critic of Austin, relegated "to the limbo of positive morality."<sup>1</sup>

This analysis of law, the corner-stone of Austin's system of jurisprudence, has recently met with a vigorous attack from learned writers. Mr. James C. Carter, in his oration on the "Ideal and the Actual in the Law,"<sup>2</sup> has flatly denied that law is in any true sense a command, and maintained that it is really custom. Law, as he defines it, "consists of rules springing from the social standard of justice;" it is a "department of sociology," "one of the great facts of society itself." The necessary result of this view is that there is properly no such thing as judicial legislation.<sup>3</sup> By the very definition of law as something which is created by and exists in society, it cannot be made by the judge; he is merely the expert appointed to "search for" the law, and to affix to it, when discovered, his official stamp. Even the legislature does not make law in a strict sense. Its function, which is properly secondary and auxiliary to that of the judge, is to assist society in getting rid of its old customs and forming new ones. Similar ideas have been expressed<sup>4</sup> by Professor Hammond, of St. Louis, who rejects Austin's conception of sovereignty, and defines law as a "principle of order existing in society." The view that the judges have a

<sup>1</sup> Professor Hammond, notes to Blackstone, I. 119. Mr. Holland, a follower of Austin, corrects in his *Elements of Jurisprudence* (3d ed.), 51, what appears to be a slip in Austin's reasoning as to the point of time at which the custom must, according to his theory, become law.

<sup>2</sup> Delivered before the American Bar Association, August 21, 1890.

<sup>3</sup> *The Ideal and the Actual in the Law*, 7, 17.

<sup>4</sup> Notes to Blackstone, Vol. I. s. 2.

delegated power of legislation he regards as a confusion of the historical and the scientific aspect of the subject.

An admirable essay by Mr. T. J. Lawrence, of Cambridge, England,<sup>1</sup> throws light on this perplexing difference of opinion. His subject, International Law, led naturally to a consideration of the Austinian theory, for it is a necessary result of that theory that international law is strictly not law at all. The current idea of law, according to Mr. Lawrence, contains so many elements that no definition could embrace them all. For the precise definition and classification, however, which scientific investigation requires, some one element must be selected and made prominent. Just as economists select for purposes of scientific inquiry the desire to grow rich, and reject all the other motives which influence human action, so Austin rejects all the other elements in the complex conception of law, and constructs his system wholly on the basis of the force which compels obedience to its rules. The conception of law reached by this process is necessarily an abstraction. The method is scientifically correct, but its results must be incomplete, and can therefore be only approximately true. For the jurist as well as for the economist it is a logical error to forget the elements which he has laid aside. This being the method by which a scientific conception of law is reached, the question arises whether the classification on the basis of force is the most satisfactory one. For the economists this question of classification is made easy by the fact that one motive, one element in the problem, clearly predominates. If the element of force were equally predominant in the conception of law, the system of the Analytical Jurists would be as clearly correct. But Sir Henry Maine has demonstrated that Austin's notion of law is inapplicable to the more primitive communities, and Mr. Lawrence is of the opinion that though provisionally accurate for a certain stage, it becomes less applicable as society advances. Obedience to law comes more and more from a recognition of its justice and propriety, not from the fear of punishment, and the law thus becomes the "product of the stored-up wisdom of the community" rather than the command of a superior. The force which compels submission becomes less prominent as an essential element in our legal con-

---

<sup>1</sup> *Essays in International Law* (2d ed.), Chap. I. The basis of this essay, as the author states, is to be found in Lectures XII. and XIII. of Sir Henry Maine's "Early History of Institutions."

ceptions, while the notion of order gradually takes its place. In the ideal condition toward which civilized society is tending all men would obey the law without compulsion, and the element of force would thus disappear altogether. This development is especially brought out in a democracy, where the distinction between sovereign and subject fades away, and the force behind the law comes from the very persons whose conduct it regulates. "When," says the writer,<sup>1</sup> "the hitherto neglected subject of the effect of forms of government on legal conceptions comes to be carefully studied . . . it will . . . be found that democracy engenders views of law quite irreconcilable with those put forward by Austin," — a prediction which is verified in the writings of Mr. Carter and Professor Hammond.

From these views the conclusion is drawn that in rewriting the philosophy of the law, the notion of order should be substituted for that of force as a basis of classification, law being defined as a "rule of conduct actually observed among men." The fact that the rules of the municipal law are always enforced by a political superior would then be regarded merely as one attribute of that law as distinguished from other species of the wider genus. This would include international law — the rules of conduct observed among nations — and other classes of rules which, though not commands of a sovereign, satisfy the definition suggested above.<sup>2</sup> The same idea has been suggested by a learned writer<sup>3</sup> who has said that Austin's definition is valuable "rather practically than philosophically," and has asked in what respect the rule that a dress suit must be worn to a dinner-party is less a law than the Statute of Usury in New York, which juries are never asked to enforce.

It has been impossible here to do more than indicate, briefly and inadequately, the outlines of this theory. It is valuable, however, for the cautions which it suggests against the unguarded application of the doctrines either of Mr. Carter or of Austin

---

<sup>1</sup> *Essays in International Law* (2d ed.), 16.

<sup>2</sup> This conception of law is well illustrated by the body of customs which we call the "law merchant." Take, for example, the rule which makes the 17th section of the Statute of Frauds a dead letter in the Liverpool Exchange (1 *Law Quart. Rev.* 24). It is obvious enough that this is not a law in Austin's sense. Yet in the definiteness of its sanction, and in its binding force as a rule of conduct, no command of a sovereign could be more effectual.

<sup>3</sup> 5 *American Law Review*, 1.

(a) The former seems to involve a confusion between the genus and the species in the classification just indicated. Although it may be true that law in its widest sense includes all rules of conduct actually observed among men, and that Mr. Carter's thesis that law is custom is in so far correct, it cannot be denied that law in the narrower sense in which we habitually use it,<sup>1</sup> *i.e.*, municipal law, consists of a set of rules in which the element of force and a definite sanction are ever present and most important. Whether or not these are rules commanded by the sovereign, they are at least rules enforced by him, and those only. The difficulties which seem to have been escaped by denying that law is a command thus recur in the question, What rules does the sovereign enforce? To answer that he enforces the customs of the people, the "expressions of society in its jural relations," is to confuse the source and mainsprings of the law with the rule of law itself. That this rule proceeds in some form or other from society's sense of what is just and expedient is no justification for neglecting the medium by which this sense finds expression. It is for the latter, the rule promulgated from some recognized source, and not for the former, that the judge must "search." This is clearly shown by the fact that so far as the two are inconsistent, as, for example, in the case of a constitutional but unrighteous statute, the judge is bound by the rule, and is not at liberty to look into the conflicting custom. Such a confusion between the rule and its source—between law and ethics—would hardly have been possible in a community where the law habitually found statutory expression. (b) The analysis suggested by Mr. Lawrence has a bearing no less important on Austin's treatment of law as a command. This form of expression may, by the maxim that the sovereign commands what he permits, undeniably be made to cover all laws, since law in our sense is limited to rules enforced by the sovereign. It is probably true, moreover, that this conception applies with fair correctness to the conditions of modern society. Whether in rewriting the philosophy of the law the notion of order should be substituted for that of force, or whether Austin's classification is the better, is a question which is not for us. But it is of the first importance to perceive that Austin's theory is a development; that it is not, as its advocates seem to have thought, a "body of fixed, irrefragable truth,"

---

<sup>1</sup> In this sense, unless otherwise mentioned, it will be used in this discussion.

but is only "temporarily and provisionally accurate."<sup>1</sup> Sir Henry Maine has shown, with the genius which has done so much to illuminate the history of the law, that there are times and conditions of society to which the Austinian analysis is utterly inapplicable. In such communities custom is blindly followed without a thought of discussing the reasons for so doing or the consequences of disobedience. The obligation of the custom proceeds from itself, and is wholly independent of any human superior. The ruler, though often so absolute as to fill to the letter the requirements of Austin's sovereign, has no thought of changing the customs; indeed, he may never once make a law in Austin's sense.<sup>2</sup> Such are the village communities of the East to-day, and such, so far as observation has shown, has been the condition of primitive societies generally at one stage of their growth. In this growth the conception of the judge, as expounding the customs, preceded that of the legislator,—a circumstance which shows plainly enough the historical inaccuracy of the theory by which the judge is regarded as exercising a delegated power of legislation. It was long before the two notions of judging and legislating were clearly separated. When the ruler was appealed to in early times as a law-giver it was not to make laws, but to declare them; not to change the existing customs, but to guarantee their enforcement. The notion of legislation in our sense is essentially a modern growth, among progressive Western societies.

This inadequacy of the Austinian theory as applied to customary law has a special significance for us; for we live under a body of customary law which has come down in a stream comparatively unbroken from remote times. Modern study is revealing every day more plainly the permanence of our legal conceptions, and the great importance, so often underrated, of the Germanic basis of our law. It will not do, then, to forget that there was a period in its growth when it would have been a mere figure of speech to deal with it as the command of a sovereign. The conditions of the present time are of course very different. But even if the provisional accuracy of Austin's theory of law be conceded, the abstraction of which it is the result discards one element which must never be forgotten; *i.e.*, "the entire history of each

---

<sup>1</sup> Lawrence, 6.

<sup>2</sup> Such a ruler is described by Sir Henry Maine in his *Early History of Institutions* (3d ed.), 380.

community," the "mass of historical antecedents which determines how the sovereign shall exercise or forbear from exercising his irresistible coercive power."<sup>1</sup> This divorce from history is a circumstance of the highest importance. It means nothing less than rejecting the element most essential to a correct understanding of such a subject as the English law. That the Austinian identification of law with legislation should lead, among other things, to a slighting of the common law is almost inevitable. One must indeed be constantly on his guard against too literal an application of the doctrine that a law is a command. It has often been used in connection with the common law in such a way as to turn the mind from the true function of the judge, that of deciding controversies, and to confuse the process with that of issuing general commands.

Much that has been written on the subject of judicial legislation really turns on these questions of the nature of law, and is made clear by an understanding of the different theories on the latter subject. When Professor Hammond, for example, maintains that the judges merely declare the law, and denies that they have the delegated authority to make it which Austin attributes to them, he is only restating in another form his proposition that law is not a command, but a principle of order. He expressly admits the growth of law by judicial decision when he says that in a historical, as distinguished from a scientific, sense the judges do legislate. On the subject of judicial legislation in our sense the difference of opinion between him and Austin is thus more apparent than real. They give the process different names, but they agree as to its existence.

Turning from these questions of the nature of law in its broadest sense, certain points in regard to law in our more restricted sense may now be assumed. It is a body of rules of some kind; those rules which are enforced by the sovereign power in a state, and those only. The source and support of these rules, in a civilized and self-governing community, must be justice; that is to say, the opinion of the community as to what is right and expedient. They are the medium by which the moral sense of society finds expression, the conservative force by which the majority registers its conclusions and enforces them upon a recalcitrant minority. Since we deal with those rules only which

---

<sup>1</sup> Maine, *Early Hist. Inst.* (3d ed.) 360.



are enforced by the sovereign, it may be practically convenient to regard them as the sovereign's commands; but in using this form of expression the cautions which have been suggested must not be forgotten. The question of this essay resolves itself, then, into this: How far is it the proper function of the judge in our system to shape and develop the rules which constitute the municipal law?

II. (a) This question calls first for an examination of certain characteristic features of the English law. The common law, strictly so called, must be taken as a type, though it will be desirable for purposes of comparison to refer to the process by which statute law is applied. This limitation of the discussion to the common law makes it necessary to lay aside one subject of which notice must here be taken, namely, the great system administered by courts of equity. Growing up, not as a separate system of law, but merely as another mode of administering the common law, and in this way of remedying its defects, it has by its operation given rise to a great body of rights, derivative in their nature and based on its peculiar remedies.<sup>1</sup> If our object were a history of judicial legislation in the past, nothing would deserve more attention than the remarkable borrowing of equitable principles which for one cause or another has gone on in courts of law. To estimate the importance of these additions, without which our law would be a very different thing from what it is, it is only necessary to consider, as a single instance, the enormous reach of the purely equitable doctrine of estoppel. At the present time, however, the principles of equity are comparatively fixed and definite, and the two systems of law and equity are to a great extent administered by the same courts and merged into one complete whole. Therefore, though their so-called fusion makes it none the less necessary to remember the abiding distinctions between the two systems,<sup>2</sup> much that is here said will have an application to both.

Coming then to the common law of England and the method by which it decides a case, it is important to observe at the outset how the process presents itself to the judges, the persons in whose control it lies. Their testimony is unanimous. From the earliest times to the present day they have agreed in what Austin has

---

<sup>1</sup> See Professor Langdell in 1 *Harv. L. Rev.* 55.

<sup>2</sup> See 4 *Harv. L. Rev.* 394.

stigmatized as the "childish fiction"<sup>1</sup> that they were "not delegated to pronounce a new law, but to maintain and expound the old one."<sup>2</sup> This idea of applying the existing law, a body of "statutes worn out by time," as Chief Justice Willes called the common law,<sup>3</sup> appears everywhere in our reports.<sup>4</sup> The judges constantly stop short of the most tempting equity<sup>5</sup> with the declaration that they are to declare, not to make, the rule of law. Nothing could be more radically different from this attitude than the position of judges sent out to decide controversies according to their own judgment in each particular case, the mere *abitrium boni viri*.<sup>6</sup> Even such a declaration as that of the French code, which forbids the judges, under a penalty, to let any case fail for lack of law,<sup>7</sup> would be incomprehensible to an English judge, if intended to mean anything more than a just and wise application of the common law, a process which he regards as declaring the law. The views of the judges on this subject must not, it is true, be accepted too absolutely, for a striking feature of the common law has been the steady development along its characteristic lines, unaffected by the theories of its expounders. In case of any conflict between theory and the traditional methods, the courts have been able conveniently to slough the former, and have proceeded as their predecessors did before them.<sup>8</sup> Only by a study

---

<sup>1</sup> "The childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges." Austin's Jurisprudence (4th ed.), 2, 655.

<sup>2</sup> Blackstone's Coms., I. 69.

<sup>3</sup> 2 Wils. 348. See Christian's notes to Blackstone, s. 3.

<sup>4</sup> The common-law theory is stated and expounded by Chief Justice Shaw in *Norway Plains Co. v. B. & M. R.R. Co.*, 1 Gray, 263, 267, and *Com. v. Temple*, 14 Gray, 69, 74.

<sup>5</sup> See Hammond's notes to Blackstone, I. 216.

<sup>6</sup> Such appears to have been the situation in certain temporary courts created after the Great Fire of London by St. 18-19 Car. II. c. 8, s. 25.

<sup>7</sup> Code Civ., art. 4; see Markby's Elements of Law (3d ed.), s. 26.

<sup>8</sup> So Lord Chief Justice Keble said the law of England was "the very consequence of the very decalogue itself," "as really and truly the law of God as any Scripture phrase," and that "whatever was not consonant to the law of God in Scripture" was "not the law of England, but the error of the party which did pronounce it." (5 How. St. Tr. 172.) Yet he would have had no difficulty in denying that it was slander to accuse a pure woman of unchastity; and if the obligee of a bond paid before the day had contrived to regain the instrument, the Chief Justice (or at least his predecessors) would have been likely to resent the interference of equity to prevent a second payment. Indeed, a "serjeant of the law of England" is represented in the 16th century as saying of this very form of equitable relief: "And so me seemeth that it is not only against the

of the cases themselves can an exact analysis of the methods of the common law be reached. But in the inquiry what the English system does, as distinguished from what other systems do, or what might conceivably be done, the conception of the judicial function which presents itself to the judge himself is of the first importance.

The distinguishing feature of the English law is the binding authority which it attributes to a former decision. This respect for precedent, in which our system is unique,<sup>1</sup> has much importance in the present inquiry. It is the circumstance, together with the absence of codification, which gives rise to the cardinal feature of our law, *i. e.*, that it is bound up with the facts of particular cases. It is this feature which furnishes a clew to the characteristic processes of the common law.<sup>2</sup> The method by which a case is decided may be briefly stated as follows: After the necessary analysis of the facts, the first question for the court is whether the same facts have been passed on before. If so, the inquiry is closed.<sup>3</sup> This case falls within the rule of the earlier

law of the realm and against the law of reason, *but also against the law of God.*" (Doct. & Stud., appendix.)

<sup>1</sup> Markby, *Elements of Law* (3d ed.), s. 92. So Sir Henry Maine says (*Early Hist. Inst.*, 3d ed., 47): "Nowhere is anything like the same dignity as with us attributed to a decided 'case,' and I have found it difficult to make foreign lawyers understand why their English brethren should bow so implicitly to what Frenchmen term the 'jurisprudence' of a particular tribunal."

<sup>2</sup> Markby (3d ed.), s. 98, couples with this feature of the common law its *ex post facto* quality, and regards these two as the most significant among the several properties of "judiciary law" enumerated by Austin. It may be doubted, however, whether Markby in saying this, does not overrate the importance of the latter quality as a distinction between the common law and statute law. It seems to be one of form rather than substance. It is true that with a new state of facts it is in a sense impossible to say, under our system, that the law exists before the case is decided. Yet if principles exist which make it certain how the case will be decided, it is the same, from a practical point of view, as if the law previously existed. Statute law, on the other hand, exists in form before the determination of a case; yet in the event, which too often occurs, of a well-founded uncertainty what construction will be put upon the statute, its substantial *ex post facto* quality when the case is decided is plain.

<sup>3</sup> *I. e.*, this is so in a system of case law carried to its strict logical extreme, of which the English theory in regard to the decisions of the House of Lords is an instructive instance (see Blackburn, J., in 1 Q. B. D. 515, 528; Pollock, *Science of Case Law*, *Essays in Jurisprudence*, 237). The right to overrule former cases does not materially alter the theory. The later court may, as in England, be required to accept the error on these facts, or may, perhaps more rationally, be allowed to disregard it as an erroneous application of the sources from which the earlier tribunal reasoned, and to fall back on those sources themselves.

one, and is thus disposed of. If the present facts do not directly fall within any case, or any hard-and-fast rule already settled, the first inquiry of the judge is for decided cases similar to this. Instances are produced, each showing the law on a particular state of facts, and presenting an analogy to the case in hand more or less direct. These cases are scrutinized, classified, distinguished; the wider principles which they illustrate, and which are claimed by the contending parties to include the present case, are determined and tested by a comparison with other branches of the law; and thus a decision is finally reached. Paley has given the following description of the process: "It is by the urging of the different analogies that the contention of the bar is carried on; and it is in the comparison, adjustment, and reconciliation of them with one another, in the discerning of such distinctions, and in the framing of such a determination as may either save the various rules alleged in the cause, or, if that be impossible, may give up the weaker analogy to the stronger, that the sagacity and wisdom of the court are exercised."<sup>1</sup> Austin quotes this passage, and separates the process into that of extracting the law, the *ratio decidendi*, from the cases, and then applying it. But Paley's statement is valuable as calling attention to the frequent failure of the common-law judges to distinguish between these two processes. Often, as has been well said, they do not extract a rule and then apply it, but determine the rule *by applying it*.<sup>2</sup> Mr. Pollock, in an ingenious essay on the "Science of Case Law,"<sup>3</sup> has compared the reasoning of a system of case law to the method of a natural science, and has pointed out how the fundamental assumption of the uniformity of law is as necessary in the one as that of nature is in the other. Without this assumption the argument from precedent means nothing; unless the former case was decided under the same law, it is not a precedent at all.<sup>4</sup> Yet as the natural science grows, expands, develops, with each new experiment, so the decision in each case is a step in the growth of the law, a new *datum* for future reasoning.<sup>5</sup> As this

---

<sup>1</sup> Paley, *Moral Philosophy*, II. 259.

<sup>2</sup> Markby, *Elements of Law* (3d ed.), s. 100. Maine seems to have the same point in mind when he says (*Ancient Law*, 9th ed., 32) that we are "not in the habit of throwing into precise language the legal formulas which we derive from the precedents."

<sup>3</sup> *Essays in Jurisprudence*, 237.

<sup>4</sup> Hammond, notes to Blackstone, I. 222.

<sup>5</sup> Maine, *Ancient Law* (9th ed.), 31-2.

process goes on, fought over at every step by trained counsel and scrutinized by the court, there is a constant shaping of the law. A principle which lay vaguely in the cases takes a more definite form, its boundaries on the one side and the other are determined, and it becomes eventually as fixed and precise as a statutory enactment.

(b) To illustrate these processes of the common law, and the results to which they lead, it will now be useful to examine somewhat in detail one or two representative cases.

In the famous case of *Fletcher v. Rylands*,<sup>1</sup> the defendant had collected large quantities of water in a reservoir on his land. He had employed a competent contractor to make the reservoir, and was himself guilty of no negligence; how far he was responsible for the contractor's negligence became immaterial to the decision. But in consequence of some old workings in the defendant's land, of the presence of which he was ignorant, the support of the reservoir gave way, and the water, escaping underground through these workings, flooded the plaintiff's mine. For the damage thus caused the plaintiff brought suit. The question was thus raised whether the defendant was bound to keep the water in at his peril, or merely to use due care. There were the competing analogies on the one side of the absolute liability imposed by the common law for damage done by trespassing cattle, by fire, by escaping filth,<sup>2</sup> or savage beasts; on the other, of the large class of cases where a defendant who drives along the street,<sup>3</sup> or handles a gun,<sup>4</sup> or raises a barrel into his warehouse,<sup>5</sup> is held responsible only for actual prudence. The argument for the contending parties dealt with principles. For the plaintiff it was urged that the only quality common to cattle, fire, and filth was that of substances collected on the land of one man which might, by escaping, damage his neighbor. The specific rules laid down by these cases were therefore to be regarded as illustrations of a general principle, applying to water as well as to cattle or filth, that a person who brought on his land something which, however harmless while there, would naturally do mischief if it escaped, must

---

<sup>1</sup> 3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330.

<sup>2</sup> *Tenant v. Goldwin*, 2 Lord Raym. 1089.

<sup>3</sup> *Hammack v. White*, 11 C. B. N. S. 588.

<sup>4</sup> *Stanley v. Powell*, 39 W. R. 76.

<sup>5</sup> *Byrne v. Boadle*, 2 H. & C. 722.

keep it in at his peril. The defendant relied on the conflicting principle that in case of a duty imposed by law (as distinguished from one created by the agreement of the parties), nothing more than actual prudence was required, and dealt with the cases relied on by the plaintiff as isolated exceptions having no bearing on the case in hand. This view was adopted by the Court of Exchequer, Bramwell, B., dissenting. But this judgment was reversed in the Exchequer Chamber. Blackburn, J., in an elaborate opinion, which is an excellent example of common-law reasoning, indorsed the principle suggested by the plaintiff, which, he said, applied equally, "whether the thing be beasts, or water, or filth, or stench." He thus rejected the broad principle contended for by the defendant; and he distinguished the cases of collision on the highway, and the like, on the ground that there the plaintiff, by entering into a situation where the chance of accident might reasonably be foreseen, took the risk upon himself. The House of Lords affirmed the judgment of the Exchequer Chamber and expressed particular approval of the opinion of Blackburn, J. Lord Cairns suggested as the test the question whether the use of the defendant's land was "natural" or "non-natural," the present case being an illustration of the latter class.

The noticeable feature of this course of reasoning is the scrutiny and comparison of previous cases, and the extraction from them of a principle within which this case is held to come. The process thus takes on the form of declaring the existing law, of applying the principle, like a statutory rule, to the facts. But these "principles" which are under discussion, and of which the cases are regarded as specific applications, are clearly not in all respects like definite rules of law. They differ from such rules in their scope and precision, approaching in this respect those general maxims or ground rules by which the whole reasoning process is carried on.<sup>1</sup> They are rather to be regarded as guides in drawing analogies, and their precise limits are in dispute. Moreover, a statute necessarily precedes its application; here the process is reversed. The cases came first, the statement of the principle afterward, as something extracted from them. They cannot strictly be called applications, or, at any rate, conscious applications, of the princi-

---

<sup>1</sup> Maine has remarked in his *Village Communities*, 335, on peculiarities in the use of the word "principle." As a matter of fact, we use the word in various senses, and it is impossible to tie it down to any one meaning.

ple. Some of them, at least, were probably decided without any thought of it. The law in regard to cattle goes back to the earliest times. Whatever its historical origin,<sup>1</sup> it certainly antedates modern methods and conceptions. And so the liability for fire, whenever it was settled, was probably not reached by the application of any such general principle as that laid down by the court in *Fletcher v. Rylands*. As to these two articles, however, cattle and fire, the law is fixed, and to this extent we have settled rules of law. *Tenant v. Goldwin* adds a rule as to filth, and there begins to be a group of cases which suggests some connecting link. Still there can hardly be said to be any rule of law yet in existence within which *Fletcher v. Rylands* falls. Strictly regarded, that case merely draws an analogy from the previous ones. The actual decision has, in a way, a double effect. Besides adding another precise rule, a judicial declaration of the legal consequences of collecting water, it has the further effect of binding together the class of cases to which it belongs, of shaping and refining their principle, and at the same time limiting the conflicting principle. The liability for cattle, originally a rule by itself, has passed over into an instance of this broader principle. In many respects, however, the precise outlines of the principle are still left vague and undetermined. What is the test, it may be asked, of a substance which comes within it? Is it limited to things which have a tendency to escape,<sup>2</sup> or would it include anything likely to do damage if it escape<sup>3</sup>—a pile of boards, for example? If the question is put in the form suggested by Lord Cairns, what is the test of a “non-natural use”? Does the principle apply only to adjoining land-owners?<sup>4</sup> These and many other questions are left open by *Fletcher v. Rylands*, and for the most part remain unanswered at the present time.<sup>5</sup> In this condition the subject is likely to remain until a succession of later cases, falling on one side or

---

<sup>1</sup> See Holmes, *Common Law*, Lecture 1.

<sup>2</sup> *Wilson v. Newberry*, L. R. 7 Q. B. 31, 33; Bigelow, *Torts*, 258.

<sup>3</sup> L. R. 1 Ex. p. 279.

<sup>4</sup> *Martin, B.*, in *Carstairs v. Taylor*, L. R. 6 Ex. 217; see Pollock, *Torts* (1st ed.), 399.

<sup>5</sup> The later English cases relate mostly to water. *Crowhurst v. Burial Board*, 4 Ex. D. 5, applies the doctrine to a poisonous yew-tree projecting over the plaintiff's land; but as Mr. Pollock points out (*Torts*, 1st ed., 400), this may be brought under the head of nuisance. In Massachusetts the principle has been applied to snow on a roof. *Shipley v. Associates*, 101 Mass. 251. In some States *Fletcher v. Rylands* has been rejected altogether. *Losee v. Buchanan*, 51 N. Y. 476; *Brown v. Collins*, 53 N. H. 442.

the other of the line, has brought out the precise limits of the rule.<sup>1</sup>

*Fletcher v. Rylands* shows one stage in the growth of a rule of law by means of decided cases. An example may now be taken of a more advanced stage in the process, where the result of a series of decisions, gradually grouped and classified, is a definite rule of law accepted and enforced by the courts in all respects like a legislative enactment.

The law of distress, an ancient branch of the common law, gave the landlord a lien upon any chattels found upon the premises, even though they were the property of a third person. From early times, however, it was recognized that this rule was not universal. For one reason or another, certain goods were held to be privileged from distress. The early decisions probably proceeded upon simple grounds. "This would tend to a breach of the peace;" "it would discourage trade;" such arguments as these were the controlling considerations. The cases as they multiplied fell naturally into certain groups, and in 1744 Chief Justice Willes, in deciding that a stocking-frame was exempt from distress,<sup>2</sup> as an instrument of trade, enumerated five classes of articles privileged, either conditionally or absolutely. Among the latter were "things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed, in the way of his trade or employ."<sup>3</sup> In the case of *Muspratt v. Gregory*,<sup>4</sup> nearly one

---

<sup>1</sup> In one particular, however, this process has already been performed by a series of later decisions. *Fletcher v. Rylands* expressly left open the question what circumstances would excuse the defendant. It has since been held that the act of God is an excuse (*Nichols v. Marsland*, 2 Ex. D. 1); so of the act of a third person (*Box v. Jubb*, 4 Ex. D. 76); the fact that the water was collected in the performance of a public duty (*Madras Co. v. Zemindar*, L. R. 1 Ind. App. 364); or for the joint benefit of the plaintiff and the defendant (*Carstairs v. Taylor*, L. R. 6 Ex. 217); and it has even been suggested (*Carstairs v. Taylor*) that the defendant was not liable for an escape caused by rats. These cases leave a very limited field of operations for the principle of *Fletcher v. Rylands*. Moreover the doctrine, which had an important influence on the decision (see Lord Cranworth's opinion in the House of Lords), that a man who sets a force in motion must answer at his peril for the consequences, has lately been repudiated in England (*Stanley v. Powell*, 39 W. R. 76), as it was long ago in this country. It is not impossible that *Fletcher v. Rylands* may yet come to be regarded as a somewhat illogical appendage to the class of cases where, though the want of due care is a necessary element of liability, the mere occurrence of the accident is held to raise a presumption of negligence.

<sup>2</sup> *Simpson v. Hartopp*, Willes, 512.

<sup>3</sup> This was quoted in substance from the earlier case of *Gisbourn v. Hurst*, 1 Salk. 250.

<sup>4</sup> 1 M. & W. 633; 3 ib. 677.



hundred years later, the defendant in distraining upon his tenant, a public manufacturer and seller of salt, seized the plaintiff's boat, which was lying in a canal on the premises waiting to be loaded. It was usual for the tenant's customers to send their own boats in this way. In regard to the defendant's right to seize this boat the Court of Exchequer was divided. Parke, B., made an elaborate review of the cases, beginning in the time of Edward IV., which illustrated Willes's rule about things "delivered in the way of trade," and came to the conclusion that these rested on the principle of public welfare that trade must not be unduly restricted. The "principle of the rule of exemption" covered all goods placed in a trader's hands to give the owner the full benefit of the trade as it was actually carried on. He therefore held these goods to be privileged, thinking it "contrary to the established mode of judicial decision to include one class of goods which fall within the mischief, and exclude another, merely because the case had not risen." But the majority of the court, and the Exchequer Chamber on appeal, held otherwise. *Prima facie*, they said, the goods were liable to distress, such being the general rule. To exempt them they must be brought within some recognized class of exceptions; and in the class then under discussion every recorded case related to a trade which actually consisted in dealing with other men's goods. The privilege would therefore be carried too far by Baron Parke's principle, and this boat, not being delivered to the tenant to be itself worked on, fell within the rule, not within the exceptions. Having thus interpreted the cases, the court declined to consider whether Baron Parke's view was more expedient. Lord Abinger professed a reluctance to trust his own judgment on that subject as a basis for making rules or engrafting exceptions. Public convenience might some day require that *all* goods should be privileged from distress, just as a German author had suggested settling the Irish question by holding every tenant to have an absolute right to the land. Cases perfectly new, he said, to which the law furnished no analogy, must, "by the law of England, and indeed of all countries," be "determined as they arise, by the good sense of the judges." But this had no application to the present case, which must be governed by the rules and principles of the existing law.

The last stage in the gradual stiffening which this rule has undergone may be seen in *Clarke v. Milwall Dock Co.*<sup>1</sup> No

---

<sup>1</sup> 17 Q. B. D. 494.

statute could be more strictly construed than the rule of exemption as applied in that case. A ship which the tenant was building for the plaintiff was distrained by the defendant. The title had passed, according to the peculiar rule of the English law in regard to ships, while the building was going on. The ship was thus the plaintiff's property; it was being worked on by the tenant, whose trade consisted in working upon other men's goods; and if the plaintiff had only delivered it to the tenant, the exact terms of the rule acted on in *Muspratt v. Gregory* would have been satisfied. It was urged that this lack of a delivery was immaterial. But the Lord Chancellor replied that he was not at liberty to inquire whether one part of the rule was more essential than another; he was limited to its precise terms. He therefore held, though expressing regret at the result, that the absence of a delivery was fatal to the plaintiff's claim of exemption. Lord Esher, in concurring, said the exceptions laid down in *Sampson v. Hartopp* were "stated in the form of rules, not principles, and that distinction was upheld in *Muspratt v. Gregory*, where the court was asked to find that they were principles, but refused to do so."

In the process of "judicial codification"<sup>1</sup> which these cases have been used to illustrate, the order of development is seen to be, first, the cases; then the rule, growing up by successive decisions and taking on a definite shape; then the application of that rule, like a statute, to further cases. This development, however, is very gradual. The process of working out analogies by a principle (to adopt Lord Esher's distinction between "principles" and "rules"), and that of applying the final judge-made rule, shade into one another by imperceptible degrees, and it may be impossible to say at any given time whether a decision is new law, or is merely the application of an existing rule. Different branches of the law reach the final stage at very different periods, according to the lines in which society develops. As the pursuits and interests of men turn in one direction, the cases on that subject become numerous, the analogies multiply, and the law passes into a comparatively rigid condition. This happened at an early time to the English law of real property in some branches, and its growth has therefore required the aid of the legislature to an unusual degree. On other subjects we are at the present time passing

---

<sup>1</sup> Maine, *Village Communities*, 368.

through the earlier stages of the process. In the law of corporations, for example, the courts are now engaged in examining the essential features of these important instruments of modern civilization, and in testing the various principles and analogies offered by the cases, and have yet to reach the situation where definite and comprehensive rules emerge from the chaos.

The instances which have been considered serve to illustrate the method of reasoning by which a case is decided under our system, and the effect of the decision when made. That the process involves the development and expansion of the law at the hands of the judges is plain enough. It must needs be so because of two circumstances, — the effect which we give to precedent, and the infinite variety of facts which present themselves. The law at any given time is limited to rules actually prescribed or enforced by the sovereign.<sup>1</sup> As new states of fact constantly come up for determination, and the decision once given becomes in turn a precedent for future reasoning, it is impossible that the law should not grow;<sup>2</sup> and it is thus that the great body of our law has developed. It is highly important, however, to distinguish between the result and the process by which it is reached, and thus to avoid the errors of those who, looking only at the former, conclude that the judge under a system of case law is a mere subordinate legislator of a peculiar kind. In one sense it is true that the judge makes law; but this is because of the effect which our system gives to his decision, an effect which is equally given (and the consequences of this are important) to his decision in apply-

---

<sup>1</sup> So in *Y. B. 33 Hen. 6*, 7, 23, *Prisot, C. J.*, replies to the argument that a certain matter is settled by use, and so is a "positive law:" "that is not so; for there cannot be a positive law except such as is adjudged or made by statute, and here that is not the case."

<sup>2</sup> This is clearly explained in *Maine, Ancient Law* (9th ed.), 31-3. Compare also the remarks of Lord Esher (then Sir W. B. Brett) before the committee appointed by the House of Commons, in 1876, in regard to the liability of the employer for injuries to servants: "The judges have no right to make law, and in general they do not suppose they are making law. . . . What [they] may do and must do . . . is to apply an admitted principle of law to the new combinations of fact which arise from day to day; and it would be impossible that they could otherwise administer the law, for anybody who has been conversant with the law knows that new combinations of fact, which have never been brought before courts before, are brought before them almost from day to day." These observations were made with special reference to the rule that a master is not liable for injuries to a servant caused by the negligence of a fellow-servant. Members of the committee had suggested that it was undesirable that rules of such importance should be introduced by judicial decision.

ing a statute. In another sense it is equally true to say with Blackstone that he is merely declaring the existing law. The process in which he is engaged is that of deciding a case, a process which antedates not merely legislation proper, but the conception of law itself. This decision is reached by a course of reasoning from existing *data* by which, if carried out with entire strictness, he would be as closely limited as if dealing with a statute. The process of dealing with statute law will be referred to later on: what it is important to observe at this point is the growth which necessarily attends the ordinary administration of that body of "written case-law"<sup>1</sup> which we know as the "common law."<sup>2</sup>

(c) This growth of law through its application is neatly brought out by another class of cases, which deal with the functions of the court and jury. To the institution of the jury are due many peculiarities of our system, among others its sharp division between law and fact; and when the question is one of drawing the precise line between these two things, there is an excellent opportunity of observing how matter is constantly carried over from one side of that line to the other. Take, for example, the important class of actions for negligence. The standard in those cases

---

<sup>1</sup> See Maine, *Ancient Law* (9th ed.), 13, 14, where the inaccuracy of the expression "unwritten law" is pointed out.

<sup>2</sup> One important source of judicial legislation which is peculiar to the common law must be noticed in passing. In considering the growth which must *necessarily* result from the application of the law to facts, it has been assumed that the reasoning process under discussion is strictly and logically carried out. But to make this assumption is to look at only one side of the matter. The characteristic method of the common law is, as we have seen, to work along from case to case, dealing with each one as it arises, and disclaiming any intention of framing a general rule. "However it may be in other cases," the court will say, "on these facts the law is clear." It is common to see extremes at which the law is clear, while the line at which they divide remains obscure until determined by the gradual convergence of the cases. By the slow course of decision just so much law is developed as society requires, and no more; and later generations are left free to fill in the gaps in accordance with their own notions, as little hampered as may be by those of an earlier age. In the process of reconciling and adjusting the authorities, and extracting from them the principle for which they stand, there is a constant tendency to mould it into a form which corresponds with the later conceptions of justice and expediency, and which, though consistent with the actual result of the earlier cases, may be quite foreign to the ideas of those who decided them. The growth of the law, as it is sometimes said, is rational rather than logical. This so-called "flexibility" of the common law is most important, and goes far to explain the success with which it has adapted itself to changing conditions of society. The famous case of *Reg. v. Jackson*, 1891, 1 Q. B. 671, denying the husband's right of physical restraint over his wife, is a good instance of this infusion into the law of ideas which would have found little favor with the judges a century ago.

is the broad test of reasonableness, to which the courts turn in any situation for which the parties or the law have failed to provide more specifically. The jury is given the standard of the reasonable man; it is for them to say whether under all the circumstances that standard has been complied with. But behind this question, which is purely for the jury, there is always the judicial question whether the jury itself has kept within the bounds of reason. This is a mere question of fact, but it is one which the court must answer as a part of its general duty of supervising the proceedings in court and regulating the action of the jury. Often — in certain classes of cases only too often — it becomes the duty of the court to say that the jury has exceeded its bounds, and to declare that the plaintiff or defendant, as the case may be, cannot rationally be held to have performed his legal duty. With every such declaration that the acts in question are, as the phrase is, not merely evidence of negligence, but negligence *per se*, the legal standard of prudence is to some extent fixed and defined, and the field of the jury is correspondingly narrowed. The broad rule requiring reasonable care is in so far supplanted by the specific rule that the passenger in a railway train must not ride with his elbow out of the window,<sup>1</sup> or remain on the step of the car if there is standing-room inside,<sup>2</sup> or board a slowly moving train if there is an obstruction near by<sup>3</sup> which would make a misstep dangerous. It is true that the binding effect of such a decision is limited to the precise facts of the case, a combination which is not likely to be exactly repeated. But a later case may well contain all its essential features, and so fall within the rule which it lays down. And the process may go farther than this. If in a succession of similar cases the court finds itself repeatedly compelled to set aside the verdicts of juries, it may naturally end by laying down a general rule to dispose of them all. Such are the cases in Pennsylvania which have resulted in the enunciation of a hard-and-fast rule requiring all persons to stop, look, and listen at a railway crossing.<sup>4</sup> The question for the jury is no longer, "Did

<sup>1</sup> *Todd v. O. C. R. Co.*, 7 Allen, 207. More correctly, perhaps, beyond the outside line of the car. *Georgia Co. v. Underwood*, 8 So. Rep. 116 (Ala., 1890).

<sup>2</sup> *Quinn v. Ill. Central R. Co.*, 51 Ill. 495.

<sup>3</sup> *Hunter v. Cooperstown R. Co.*, 126 N. Y. 18.

<sup>4</sup> See *R.R. Co. v. Beale*, 73 Pa. 504. In *Penn. R. Co. v. Aiken*, 130 Pa. 380, the rule was said to be "not a rule of evidence, but a rule of law, peremptory, absolute, and unbending;" and in *Greenwood v. Phil. R. Co.*, 124 Pa. 572, it was applied to a horse-carriage on its way to a fire.

the plaintiff use due care?" but "Did he stop, look, and listen?" It has been objected that although the omission to look and listen may in a particular case be inconsistent with due care, and so require the setting aside of a verdict, it is a very different thing to declare that it must always be so;<sup>1</sup> and the Pennsylvania doctrine has been denied in many States.<sup>2</sup> But this doctrine, though perhaps an extreme illustration, is typical of the process as it is going on in every jurisdiction;<sup>3</sup> and it comes from a court which vigorously asserts the "time-honored rule," that the court must not invade the province of the jury in deciding questions of negligence.<sup>4</sup>

Closely connected with this subject is the growth of rules of presumption, of one class of which Austin has said that "they are resorted to by the courts as a means of legislating indirectly."<sup>5</sup> These rules, in regard to the true nature of which there has been much confusion, have been accurately described as *prima facie* rules of law, operating upon certain specified facts, their effect being to say that when *x* is shown, *and no more*, it is to be taken as equal to *y*.<sup>6</sup> The constant recurrence of similar states of fact, handled by the jury under the supervision of the court, leads to the growth of these *prima facie* rules, just as it gives rise to absolute rules fixing the legal standard of negligence, etc. Such and such facts, it is held, are sufficient to make a case for the plaintiff, and to shift the burden of proof. In the absence of further evidence a conversion or a sale may be taken as proved. Thus mere matter of evidence passes over into a rule of presumption. It would be easy to multiply instances of such rules from every branch of the law. A well-known example is found in the law of prescription, which shows not only the growth of the judicial rule as to when an origin beyond the time of legal memory would be presumed, but also the further step (a strong instance of judicial legislation) by which

---

<sup>1</sup> It may perhaps fairly be answered that as a practical matter the benefit of the Pennsylvania rule in ninety-nine cases more than makes up for the hundredth case in which it works injustice to the plaintiff.

<sup>2</sup> See, for example, *Terre Haute R. Co. v. Voelker*, 129 Ill. 540.

<sup>3</sup> Mr. Justice Holmes in his *Common Law*, Lecture III., comments on this process, which he regards as a resuming by the court of a function, its own rather than an encroachment on the sphere of the jury. An encroachment in the sense of an improper, or even an unnecessary, extension it certainly is not.

<sup>4</sup> *R.R. Co. v. Jones*, 128 Pa. 308.

<sup>5</sup> Austin's *Jurisprudence* (4th ed.), 509.

<sup>6</sup> Hawkins, *Wills*, preface; 3 *Harv. Law Rev.* 141, 148.

the rule of presumption passed over through the fiction of a lost grant into an absolute rule of law.<sup>1</sup>

This general head, the action of the judge in presiding over the jury, in laying down rules of court, and the like, has a far more important connection with the growth of the law than has generally been realized. To it whole topics in our law owe their very existence. The law of evidence, for example, a branch peculiar to our system, would never have developed but for the jury. It had its origin in great part, as historical investigation shows, in mere rules of court based on considerations of rough sense and practical convenience, — “that one who wished to produce a witness must get a good one,” — “that if J. S. had anything to tell, he must tell it in person,” and the like. To such simple beginnings we owe rules in which later writers have sought to find the expression of theories of morality or systems of logic. So the law of damages, which to-day assumes such large proportions, has been largely the product of the last two generations. A century ago the amount of damages was a question resting almost exclusively with the jury; but as time went on the regulation of the jury's action in this particular became a necessity. From this supervision over excessive or inadequate verdicts, which the court has exercised in its duty of keeping the subordinate tribunal within the bounds of reason, arose a set of rules based simply on justice and common sense, and from these in turn has developed what is now a complex and elaborate system.

III. (a) Up to this point we have considered the common law, and the growth which is necessarily involved in the application of it. There remains the important question whether this sort of growth is confined to the common law. Bentham thought it altogether foreign to statute law. He regarded “judge made law” as an unmixed evil, which was to be entirely cut off by a perfect code. If the rule of law was once obtained the whole problem, as it presented itself to him, was answered. He seems to have thought of the facts as lying neatly classified, waiting for the law to be applied. The application was a kind of mechanical process so simple that it could be dismissed from consideration.<sup>2</sup> The same idea

<sup>1</sup> See *Angus v Dalton*, 6 App. Cas. 740; 3 Harv. L. Rev. 183. In an article in 3 Harv. L. Rev. 141, other instances are given of this stiffening of presumptions into hard-and-fast rules, and also of the converse process by which an old rule sometimes “fades away” into mere evidence and matter of fact.

<sup>2</sup> Compare Markby, *Elements of Law* (3d ed.), 26.

appears in an interesting essay by Sir Samuel Romilly,<sup>1</sup> in the course of which he ridicules the notion that Paley's competition of analogies has any application to statute law.<sup>2</sup>

It is true that in form statute law appears to preclude anything like judicial legislation. The law already exists. All that the judge has to do is, first, to define its terms, and then to apply them to the facts in hand. Yet the difference between this process and that of dealing with case law is more one of form than substance, and though its field may be more limited and its presence less conspicuous, the same judicial development is believed to be a necessary result. This is due to the same causes of growth which we have seen in the common law: first, to the peculiar features of our system, such as the effect which it gives to a decision and the function of the court in dealing with the jury; second (and this was the point which Bentham overlooked), to the true nature of the reasoning process necessarily involved in applying *any* law to facts. The facts presented by cases are not cast in forms. The combinations are infinitely various, and the question of classification, as in every branch of scientific inquiry, is a relative one. According as you are dealing with one or another of their characteristics, the same facts may be regarded as *x* or *y*. There is thus the same "competition of analogies" as in case law, the same conflict of statutory rules as of judicial principles. One statute, for example, may prescribe a rule for innkeepers, another for carriers. A new kind of person may then appear who resembles in some respects a carrier, in others an innkeeper; and it becomes the duty of the court to say to which class he belongs.<sup>3</sup> This being so, the judicial declaration, which our system treats as a binding precedent, that the statutory rule applies to fact A, does not apply to A plus B, but does again when C is added, has, as in the common law, the effect of shaping and moulding the rule. A set of subsidiary rules, absolute or presumptive, grows up to determine what facts fall within its different terms. By the ramification of these minor rules, which are in turn adjusted and consolidated, the original law, couched in general terms, is, within its limited sphere, restricted

---

<sup>1</sup> 29 Edinburgh Review, 217.

<sup>2</sup> The error of this passage is pointed out in 2 Austin's Jurisprudence (4th ed.), 653.

<sup>3</sup> See the case of the sleeping-car, *infra*. The bicycle, the electric car, and many other modern inventions might be used to illustrate the same point.



or extended. And this involves the result of substantial development and growth.<sup>1</sup>

This point may be illustrated by the modern cases which deal with the question, on which there has been a difference of opinion,<sup>2</sup> whether a sleeping-car company is to be held to the liability of an innkeeper. The question of these cases would be precisely the same whether they arose in a code State or under the common law. The process would in either event be that of defining an inn, and of ascertaining whether a sleeping-car had the essential attributes of an inn, as the term was used by those who laid down the rule.<sup>3</sup> Yet the result, the judicial declaration that sleeping-car companies are or are not liable as insurers, has in either event the practical effect of judicial legislation in our sense. A rule has been laid down which regulates the rights and duties of a class of things which were not in existence when the law about innkeepers arose. To say that there was at that time a rule of law dealing with sleeping-cars would be to speak in a merely figurative sense. It could as truly be said that the law of the electric telegraph or the railway existed in the seventeenth century.

It would be easy to give instances of exceptions read bodily into statutes by judicial construction. The fictions by which the old lawyers evaded the Statute de Donis; the doctrine that a part performance takes a case out of the Statute of Frauds,

---

<sup>1</sup> There is a suggestive passage in Mill's *Logic* which points to the similarity in substance, in spite of the different form, of the reasoning in case law and in statute law. In a famous chapter the author points out how all syllogistic reasoning involves in form a *petitio principii*, and really rests on a process of induction, the syllogism being merely the final step in the process, the memorandum by which the result of previous inductions is registered. "This view of the functions of the syllogism," he adds, "is confirmed by the consideration of precisely those cases which might be expected to be least favorable to it, namely, those in which ratiocination is independent of any previous induction. . . . In these cases [the general commands of statute law] the generalities are the original data, and the particulars are elicited from them by a process which correctly resolves itself into a series of syllogisms. The real nature, however, of the supposed deductive process is evident enough. The only point to be determined is . . . whether the legislator intended his command to apply to the present case, among others, or not. This is ascertained by examining whether the case possesses the marks by which . . . the cases . . . meant . . . may be known. . . . The operation is not a process of inference, but a process of interpretation." (Mill's *Logic*, 8th ed., 146-7.)

<sup>2</sup> See *Blum v. So. P. P. C. Co.*, 1 Flippin (U. S. Dist. Ct.), 500; *P. P. C. Co. v. Lowe*, 28 Neb. 239; 20 Am. L. Rev. 159.

<sup>3</sup> The fact that sleeping-cars are modern inventions would not necessarily lead to a negative answer, since the original rule did not refer merely to inns then in existence, or to such inns as precisely resembled those.

or a later promise waives the Statute of Limitations; the rule which reads a condition into the mind of a testator, and says in certain cases that a will destroyed under a misapprehension is not destroyed; the proposition that a legatee may by a murder revoke the will,<sup>1</sup>—alike illustrate the fact that courts will not refuse to supply gaps which they conceive to have escaped the eye of the legislator. The remark attributed to Baron Martin, "Never mind the act of Parliament; take it away; the man who drew that act knew nothing about the law of England,"<sup>2</sup> is only the bolder statement of a doctrine upon which courts have more than once proceeded.<sup>3</sup> But aside from such extreme cases, it is only necessary to call to mind the law in connection with any of our famous statutes to see what the process of definition and application really means. Take the mass of cases bearing on the simple-looking words "in the presence of" in the Statute of Wills, or a "promise to answer for the debt or default of another" in the Statute of Frauds, the learning brought to bear on the subject, the subsidiary rules which have grown up to determine whether a witness is in the presence of the testator, or whether a promise is one of suretyship. Take the dozen lines of the Statute of Frauds, section 17, a redraft of which by learned persons<sup>4</sup> takes the form of fourteen propositions, any one of them longer than the original section. Or as an extreme illustration, take the rules which have grown out of the decisions of our Supreme Court (when expounding that law *for* the legislature which in this country is the only "command of the sovereign" in a literal sense), on the clause of the Constitution which gives Congress power to regulate interstate and foreign commerce.

(b) This necessary growth of statute as well as common law by its application has an importance far beyond what might appear at first sight. This is because of its bearing on the codification question. Bentham, as we have seen, dealt with this question as a choice between the law of a code on the one hand and judge-

---

<sup>1</sup> *Riggs v. Palmer*, 115 N. Y. 506; *Shellenberger v. Ransom*, 47 N. W. Rep. 700 (Neb. 1891). But see 4 Harv. L. Rev. 394.

<sup>2</sup> A Generation of Judges, by their Reporter, 87.

<sup>3</sup> See, for example, *Avery v. Latimer*, 14 Ohio, 542, where, in a collision between custom and a statute, the court gave the right of way to the former, saying: "It would hardly be consistent or proper for us to change it [the custom] because it does not exactly accord with our ideas of a proper construction of the statute."

<sup>4</sup> 1 Law Quarterly Rev. 1.

made law on the other, and his example has often been followed. The assumption is constantly made that the question of this essay is only another statement of the question of codification. In truth, that assumption is highly misleading, and has caused much confusion. The growth which we have seen in the application of statute law would necessarily appear in a code, so long as our present methods and judicial machinery continue: and the limited field of operations to which it is confined in dealing with a single statute would be considerably extended by the effort to give statutory expression to the whole law. There would, in the first place, be the entirely new cases, which, as Lord Abinger said, must in any system be left to the good sense of the judges. But these would be a comparatively slight matter. Much more important would be the past which lay behind the code. It has been shown, in an interesting article on Statutory Revision,<sup>1</sup> how futile is the attempt in the statute law to wipe off the slate and start afresh — how the history of a statute has so important a bearing on its construction that, once passed, it “is as ineradicable as a sin.” Much more would this be true of a codification of the whole common law. Just as phrases of the legislature which seem the plainest are daily receiving from courts a construction of which no one unacquainted with the history of the common law would have dreamed,<sup>2</sup> so no code, however skilfully drawn,<sup>3</sup> could prevent a constant recourse to the sources from which it was constructed. That branch of our law which is always codified, the law of the Constitution, shows plainly enough what a code leaves to the hand of its expounders. The fact that judicial legislation cannot be cut off by a code, however its form and scope may be affected, is expressly admitted by some of the most learned advocates of codification at the present time,<sup>4</sup> one of whom, in an interesting scheme for constructing a code, suggests a method for the periodical absorption of the judge-made law.<sup>5</sup> A clear understanding of this fact, that codification and judicial legislation depend on differ-

---

<sup>1</sup> Mr. Chaplin in 3 Harv. L. Rev. 73.

<sup>2</sup> As when in *Soltau v. Gerdau*, 119 N. Y. 380, a technical doctrine of the law of larceny was brought in to modify the word “intrusted” in a factor’s act.

<sup>3</sup> The difficulty of the task is pointed out by a distinguished advocate of codification when he says that “the *technical* part of legislation is incomparably more difficult than what may be styled the *ethical*.” (2 Austin’s Jurisprudence, 4th ed., 683.)

<sup>4</sup> Maine, *Village Communities*, 367; T. E. Holland in 126 Edin. Rev. 347.

<sup>5</sup> 126 Edin. Rev. 347.

ent considerations, is of the first importance. The confusion of the two questions prevents a proper statement of either; their separation does much to clear up both.

The question of codification is not for us; but there is one feature of it which should be referred to at this point. Nothing in the battle for codification, which has been fought on so many fields for a century, is more noticeable than the extreme to which each party goes. A code is represented on the one side as a cure for "the law's delay" and all its evils, and on the other as a chimerical undertaking, impossible in the nature of things. Much of this difference of opinion is explained by a true understanding of the process of applying the law to facts. For one who like Bentham<sup>1</sup> took no account of the difficulties of analyzing and classifying facts, and ignored the process of reasoning which lies, as it were, between any law and its application, there could be but one answer to the codification question. A code would settle everything, and lawsuits, except so far as they turned on mere disputed facts, might be done away with. Modern codifiers, to be sure, do not rely so much on the ancient argument that a code would make every man his own lawyer; but it is the logic of events which has accomplished this. From Bentham's premises the conclusion ought to follow; the only trouble was that he thought only of the rule and overlooked its application.

Some of his opponents, on the other hand, lay hold of what may be called the *fact end* of the process, the end which is especially emphasized by common-law methods, and forget the rule. They therefore designate codification as an attempt to anticipate every possible state of facts and thus win an easy victory over it. Yet intelligent codification has no such aim; it seeks only to cast the existing rules of law in another form. Mr. Carter, as we have seen, seems especially open to this charge of considering only the facts on the one hand and the source of law on the other, and of squeezing out, so to speak, the *tertium quid*, the rule itself, which lies between. As when he likens the judge to the referee of an athletic contest, each being, as he says, an expert chosen to declare the customs of the game. The illustration is an unfortunate one; for whatever may be true of the judge, nothing could be more untrue of the referee. In any form of athletic sports which is at all developed, the customs of the game

---

<sup>1</sup> See page 193, *supra*.

are fixed with absolute rigidity. So far as it becomes desirable to change them, they are changed from time to time by persons in authority. In a whole season of professional base-ball there are few cases in which the least doubt arises as to these rules, and such cases are decided by the umpire merely because he is the most convenient person to appeal to. So far as these rare disputes go the umpire might be dispensed with altogether. The players could easily reserve the point for the higher board which in any event ultimately decides it, and continue the game. The real duty of the umpire is to decide pure questions of fact,—whether A or B first reached a certain point, whether the ball was caught or dropped, etc. He is a jury, not a judge. If he were a judge, and if the illustration were apt, it would be fatal to Mr. Carter's argument, for base-ball, football, and prize-fighting are instances of perfect and successful codification. The conditions of the game make a code possible, and indeed necessary.

IV. From the considerations into which we have gone certain conclusions may be drawn in regard to the question of this essay.

1. Judicial legislation is a necessary element in the development of the common law. This is a consequence, in the first place, of our judicial machinery and our mode of treating previous decisions; and secondly, and especially, of the shape in which facts present themselves. In the reasoning process by which the various combinations of facts are analyzed and the law applied to them, there is necessarily growth and development, and this occurs also to some extent in statute law.

2. The extent to which this judicial legislation should properly go is a question on which precise rules cannot be laid down. An attempt to formulate such a rule has, to be sure, been recently made by high authority. In *Cochrane v. Moore*, 25 Q. B. D. 57, Lord Esher, in holding that the parol gift of a chattel *inter vivos* required delivery, drew a distinction between "fundamental propositions of law," which could be changed only by Parliament, and the "evidence of the existence of such a proposition," which was within the disposition of the court. But no test was suggested by the Master of the Rolls for making this discrimination, and his application of it to the case before him is the best criticism upon it. It is impossible to see in what sense delivery is "part of the proposition of law which constitutes a gift," yet merely evidence of a similar proposition in the case of a sale. In truth no

such absolute demarcation is possible in a question depending on such varied circumstances. It is the duty of the judge to apply the law to such facts as come before him. He must perform his office with wisdom and justice, guided by a method of reasoning which the practice of English courts for centuries has made familiar. So far as this process, carried out as his predecessors have done before him, results in legislation, such legislation is legitimate and necessary. No more precise rule can be laid down to meet all cases.

3. How far may the judge in carrying on this process undertake to discard old doctrines and substitute new ones as society appears to require it? Here again no absolute rule can be laid down. It may happen that a change of customs makes a change in the law so plainly necessary that it is mere good sense for the court to give effect to it, as was done, for example, in a branch of the law depending preëminently upon custom, by the American decisions which recognized the negotiability of bonds.<sup>1</sup> In general the maxim *cessante ratione cessat ipsa lex* might well have been given a far wider application. The history of our law shows repeated instances where courts have failed, through an unreasoning conservatism, to cut away technicalities utterly meaningless and having their origin in conceptions long since passed away; and the law as a science has suffered accordingly. A certain amount of judicial legislation of this kind might properly be regarded as incidental to the mere wise and just *administration* of the law. But no such step should be taken without great caution and a knowledge of all its bearings. The proper tendency for modern courts is not to be found by considering the acts of great judges in the past, whatever their services to the law, who were acting under other surroundings and influences; it depends on the conditions of our own time. We live under a government where access to the legislature is easy. Since the abolition of the old forms of action legal reasoning, formerly confined, as it were, to so many separate circles, is carried on in one broad field. In our twofold system of law and equity we have a body of rules and principles which, properly understood, can do much; and the true means to the more perfect development of this system does not

---

<sup>1</sup> See *White v. R. R. Co.*, 21 How. 575. In England a similar result is apparently reached by the more indirect method of estoppel. See *In re Romford Canal Co.*, 24 Ch D. 85.

lie in the judicial temper which relies on its own conceptions of justice and expediency as a substitute for the wisdom of the past. It is to no such habit of mind that we owe our inherited body of law, and it would be unfit to trust to this means for its reform. It is "wiser," in the words of an eminent judge,<sup>1</sup> "to ascertain the powers of the instrument with which you work, and employ it only on subjects to which they are equal and suited; and if you go beyond this you strain and weaken it, and attain but imperfect and unsatisfactory, and often only unjust, results." The need of the present time lies in a true critical and historical understanding of the principles of our law, which shall make clear alike its exact scope, its merits, and its defects, and thus point the way to a legislative cure of the latter. Even when a reform seems most plainly desirable, the conditions under which the judge works often make it preferable that the change should come from the legislature.<sup>2</sup> One step by the court unless followed up can cause nothing but confusion; and the fact that the actual decision alone is binding makes it often doubtful how far a later court will continue the course upon which its predecessor has entered. Whether such a course should be begun depends on all the circumstances of the case. The only sure guides are common sense, and a knowledge of the law which is founded upon a knowledge of its history.

*Esra R. Thayer.*

CAMBRIDGE, 1891.

---

<sup>1</sup> Coleridge, J., in 2 E. & B. 269.

<sup>2</sup> *Amory v. Meredith*, 7 Allen, 397, may perhaps furnish such an instance of a desirable result attained by a less desirable method. See also *Sugden v. St. Leonards*, 1 Prob. Div. 154, 244-5, 240-2, where the majority of the court proceeded on a "principle" which if enacted by the legislature would have gone far to overthrow the whole hearsay rule, yet which was probably not so intended by the court.

NOTE. — This essay received the prize offered by the Harvard Law School Association to the graduating class of 1891. — EDS.

# HARVARD LAW REVIEW.

---

Published monthly, during the Academic Year, by Harvard Law Students.

---

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

---

## *Editorial Board.*

OLIVER PRESCOTT, JR., . . . . . *Editor-in-Chief.*

PHILIP S. ABBOT, *Treasurer,*

ALBERT S. BARD,

NORMAN HAPGOOD,

CARLETON HUNNEMAN,

FREDERICK B. JACOBS

JAMES G. KING,

PHILIP WARDNER,

RICHMOND O. AULICK,

ALBERT E. HADLOCK,

HENRY HUDSON,

J. WRIGHT HUNT,

M. DAY KIMBALL,

JAMES M. NEWELL,

CHARLES WARREN,

GEORGE E. WRIGHT.

---

MEETING OF AMERICAN BAR ASSOCIATION — TRIAL BY JURY. — At the recent meeting of the American Bar Association, the well-worn subject of trial by jury furnished one of the chief topics for discussion. Hon. Alfred Russell, of Michigan, in the annual address, favored, in civil cases, the abolition of the jury, while a majority committee report advocated the less radical change of allowing a verdict in such cases by three-fourths of the jury.

The advisability of a total abolition of the jury, although there has been a constant pressure on the part of lawyers towards it for many years, seems very doubtful, but the suggestion of a majority verdict in civil cases more readily commends itself to our favor. The idea is by no means a new one among either English or American jurists. Such English authorities as Hallam, Christian, and Bentham have heartily condemned the rule of unanimity as a "preposterous relic of barbarism." Then a parliamentary commission of experts in 1830 reported in favor of a verdict by three-fourths of the jury if after twelve hours' deliberation it could not reach a unanimous verdict. Still later Lord Campbell introduced a bill to carry such a measure into effect. As yet, however, the rule in England stands unchanged. In America, too, many eminent jurists, Mr. Justice Miller among the number, have expressed themselves in favor of the abolition of the requirement of unanimity.

"The verdict of the jury under the unanimity rule." says this committee report of the Bar Association, "is often not gained by the justice of the case, but a compromise. Its effect is to prolong controversies, defeat justice, produce discontent, and bring the administration of the law into contempt." Then following out the idea of the English commission report in 1830, the report goes on: "All the benefit of deliberation would be gained by requiring the jury to continue the consideration for several hours and permit then the verdict of a majority to be given. To demand more of the jury than is demanded of other tribunals seems without the support of sound reason."<sup>1</sup>

---

<sup>1</sup> Taken from newspaper report of the meeting.



The right of the Legislature to change the ordinary rule of procedure, so that a verdict may be rendered by less than the whole of the jury, has been embodied in the constitutions of at least three States (California, Texas, Nevada), and the new practice has been found to work well. In criminal cases where guilt must be proved beyond a reasonable doubt there is a distinct reason for requiring unanimity which does not exist in civil cases, where proof needs only to be by preponderance of evidence. In this country and in England, therefore, there has been scarcely a suggestion of any change in the criminal jury. In Scotland and France, however, it is interesting to note that in criminal cases a majority verdict convicts, France having no civil jury, and Scotland discharging its civil jury after six hours' deliberation, if in that time it does not reach a unanimous verdict.

"If it could be assumed," says Judge Pitman, in a magazine article,<sup>1</sup> speaking of the rule of unanimity, "that the dissentient jurors were fairer or wiser than the majority, we could tolerate it well; but unfortunately the alliance between ignorance and obstinacy well known of old continues. . . . In civil cases where a preponderance of evidence alone is required, it would seem that sooner or later the practical American mind would conclude that when this preponderance was made out to the satisfaction of at least three-fourths of the jury and of the court it was time to make an end of litigation, especially when we consider that this state of things would almost certainly foreshadow the ultimate result, the present acceptance of which would merely avoid one of those calamitous delays of the law which have tired out sturdier natures than that of Hamlet."

LIABILITY OF ELEVATED RAILWAY COMPANIES TO ABUTTERS. — The case of *Pappenheim v. The Metropolitan Elevated Railway Company* has recently been decided in the New York Court of Appeals. In this case plaintiff purchased property on the line of the road after the road was fully established. He then brought this action for damage done to his property by the operation of the road. The defendant contended that as soon as the railroad went into operation, the damage to the property of abutters was completed once for all. That, as the plaintiff bought subsequently to this time, he received, in the lower price which he paid for the property, a due allowance for the damage inflicted by the defendant, and therefore his recovery, if any, should be for nominal damages only. Peckham, J., in deciding for the plaintiffs, took the ground that the defendant's act in maintaining their railroad in the highway was a continuing trespass on the abutter's property. The grantor of the plaintiff undoubtedly had a right of action against the defendant, but that fact made the defendant's act no less a wrong to the plaintiff. Nor was the fact material that the plaintiff acquired the property at a lower price because of the trespass. The defendant's act was still a wrong against the plaintiff, for which the latter was entitled either to an injunction restraining the defendant from operating its road or to substantial damages. The defendant's line of argument would result in preventing grantees from stopping trespasses which had begun while the property was in their grantor's hands.

This decision seems a necessary result of the previous decisions on the subject. (For a full treatment of these cases see the able article of Mr.

<sup>1</sup> *Juries and Jurymen*, 139 No. Am. Rev. 1.

Hibbard in Volume IV. of the HARVARD LAW REVIEW, p. 70.) It would seem, however, that the courts would have reached a more equitable result if they had treated the act of the defendant as inflicting a permanent damage for which compensation could have been given once for all. It is hard to treat as a continuing wrong an act sanctioned by the Legislature. The case rather resembles the taking of property by right of eminent domain than a continuing trespass. Besides, as the defendant contended, the plaintiff had received no substantial damage, as he acquired the property at a lower rate than he could otherwise have done. The decision, in effect, makes him a present of the damages recovered from the company. Still, the rule in New York is settled that such acts as those of the defendant are continuing trespasses. The court, therefore, had to choose between unsettling the law and inflicting in a few cases severe hardship on the defendant. In this view of the case it is difficult to find fault with the decision.

ALABAMA CLAIMS DECISION. — In *Williams v. Heard*,<sup>1</sup> the United States Supreme Court has added another chapter to the interesting history of the Alabama Claims award. The question was this; in 1882, it may be remembered, after paying off all the claims for direct losses, a surplus was found to be left over from the \$15,000,000, and Congress thereupon voted to pay this to those who had paid high "war premiums" on insurance policies. Did this award pass as part of a bankrupt's property in an assignment made before 1882; that is, was there any such sufficient claim on this award as to be called property of the bankrupt?

The courts of four States — Maryland in 1887,<sup>2</sup> Massachusetts in 1888,<sup>3</sup> Maine in 1889,<sup>4</sup> and New York in 1890<sup>5</sup> — decided that the award did not belong to the assignees. The Supreme Court, following Chief Justice Field's dissenting opinion in the Massachusetts case, now decides that it *did* go to them as part of the bankrupt's property.

The State courts insisted as follows: That the Geneva tribunal awarded only for direct losses and expressly excluded payment for war premiums as contrary to international law. That the United States in its whole course was enforcing rights under the law of nations, and all that was allowed it was indemnity for those rights. That when she collected the award from England, she did so as a trustee for those whose claims she had been enforcing, *i. e.*, the claims of those suffering direct loss. There was no pretence that the United States received money on any trust to pay war premiums. Hence the bankrupt had no claim sounding in trust against the fund received from England. The award by Congress, in 1882, was therefore an "act of grace and bounty," "a pure gratuity," "a simple gift" to those who had no claim on any one, either legal or equitable. As there was no claim, nothing could pass by assignment.

This reasoning the Supreme Court entirely overrules. It first sets aside — very rightly, it would seem — the idea that *any one* had a claim to any part of the Geneva award. It denies that even the direct losers had a claim, or that the money was held in trust for them. Congress could distribute or hold the money as it saw fit.

<sup>1</sup> Vol. II. Supreme Court Rep. 885.

<sup>2</sup> *Heard v. Sturgis*, 146 Mass. 545.

<sup>3</sup> *Brooks v. Ahrens*, 68 Md. 212.

<sup>4</sup> *Kingsbury v. Matlocks*, 17 Atl. Rep. 126.

<sup>5</sup> *Taft v. Warsily*, 24 N. E. Rep. 826.

Secondly, these war premiums of insurance were always recognized by our government as valid claims, and hence the United States was not bound as between its citizens by the decision of the Geneva tribunal as to international law.

The court saw, as all must see, that the idea of a pure gift as to these special payments was absurd and untenable unless the United States had been in the position at Geneva of arguing a groundless claim.

Was the claim property in any sense of the word? How does the court avoid calling ALL payments from the \$15,000,000 mere gifts? It says, though no one had a strict right or claim on the fund, still there was a "possibility of payment," "an expectancy of interest in the fund." The claims having been recognized at Geneva by the United States as valid might become valuable if the United States chose to pay.

"They were then rights growing out of property; rights, it is true, not enforceable until after an act of Congress," but still rights of property, and hence they would pass on assignment.

It is worth while noticing that here we have a right which is a mere possibility of value, a right which cannot be enforced; *i. e.*, the owner of which is remediless, and yet which is still held to be property.

Analogous to this kind of right are the rights of a bondholder against a State. He has no remedy against it in case of failure to pay, but it is a true right of property. So perhaps the payment of the simplest debt of a sovereign State is a matter depending purely in its will, and yet a property right vested in the one to whom the payment, though uncertain, is due.

---

RIGHT TO COMPEL A COLLEGE TO CONFER A DEGREE. — An interesting case has recently come up before the New York Supreme Court, which decides in brief that a man who has obeyed all the college rules and paid all the term bills has a contract right to his degree. The complainant in *People ex rel. Cecil v. Bellevue Hospital Medical College*<sup>1</sup> petitioned for a writ of mandamus "to compel the respondent to admit him to the final examination, and if he passed a suitable examination to give him a degree."

The court held that the college catalogue, the circulars issued, the course of study, and qualifications and fees specified, constituted an offer, and that "when a student matriculates under circumstances as set forth above it is a contract between the college and himself that if he complies with the terms therein prescribed he shall have the degree which is the end to be obtained. The corporation cannot take a student's money, allow him to remain and waste his time, . . . and then arbitrarily refuse to confer that which they promised; namely, the degree."

This seems to be laying it down clearly that a college cannot withhold a degree from one who has performed the requisite conditions; and that the coveted A.B. or M.D. is not merely a gratuitous favor.

The remedy in this case would seem at first peculiar, for a writ of mandamus is usually never granted in a case where there is any discretion to act or not to act in those against whom it is brought, *i. e.*, unless their duty in the matter is absolute and clear. But the court here held that an "arbitrary refusal is no exercise of discretion at all, but merely a wilful violation of the duties which they have assumed."

---

<sup>1</sup> Vol. XIV. New York Supplement, May, 1891.

THE members of the Yale Law School are to be congratulated upon the appearance of the first number of the "Yale Law Journal," a legal periodical to be published six times a year by the students, and differing but very little in its general make-up from the REVIEW. The editors have our hearty good wishes for the success of their enterprise.

## RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported for the purpose of giving the latest and most progressive work of the court. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

**AGENCY — CONTRACT TO EMPLOY FOR A TIME CERTAIN.** — The defendant, a manufacturer, agreed to employ the plaintiff as his agent to sell his goods for five years. After two years the manufactory was destroyed by *vis major*, and the defendant in consequence failed to employ the plaintiff thereafter. It was held that the plaintiff could recover damages for the breach of the contract, the court saying that no condition of the continued existence of the manufactory could be implied.

*Rhodes v. Forwood* was distinguished on the ground that in that case there was no contract to employ the plaintiff, only a contract to employ no other. *Turner v. Goldsmith* [1891], 1 Q. B. 554 (Eng.).

**AGENCY — PUBLIC OFFICER — RATIFICATION BY LEGISLATURE.** — Where the agent of a State exceeds his authority in selling and delivering the property of his principal, and taking a note therefor from the purchaser, the Legislature of the State may, by a statute duly enacted for that purpose, in the absence of any constitutional prohibition against it, ratify the act of the agent in making the sale and receiving the note, and the State may then enforce payment of the note the same as an individual. *State of Wisconsin v. Timmins*, 49 N. W. Rep. 259 (Minn.).

**BILLS AND NOTES — CERTAINTY OF AMOUNT — TRANSFER.** — An instalment note, which contains the stipulation that upon default in the payment of one instalment the whole note shall become due, is not a negotiable instrument, for it is uncertain as to the time and amount of payment.

A sells a chattel and takes a note in payment. It is stipulated in the note that the title to the chattel shall not pass till the note is paid. A indorses the note to the defendant, and afterwards assigns his title to the chattel to the plaintiff. In a suit to recover the chattel, — *held*, that by the indorsement of the note, title to the security passed to the defendant. *W. W. Kimball Co. v. Mellen*, 48 N. W. Rep. 1100 (Wis.).

**CONFLICT OF LAWS — CONDITIONAL SALES.** — A sold and delivered a chattel to B, in Georgia, with reservation of the title in himself until the purchase-money be paid. This conditional sale was not recorded as is required by the law of Georgia, to make it valid against subsequent *bona fide* purchasers. B then carried the chattel into Alabama, and there sold it, without A's knowledge. *Held*, that the *bona fide* purchaser would be protected, had the second sale been in Georgia; but that the Alabama law must govern the subsequent sale, and under that law the purchaser took no more than the seller, B, had. *Weinstein v. Freyer*, 9 So. Rep. 285 (Ala.).

**CONFLICT OF LAWS — CONTRACT OF CARRIAGE.** — Where, in another State, goods are delivered to a common carrier for transportation into Iowa under a contract limiting his liability, valid where made, but void under the laws of Iowa, the contract is valid, and governs the liability of the carrier, though the loss occurs in this State. *Hazel v. Chicago M. & St. P. R. Co.*, 48 N. W. Rep. 926 (Ia.).

**CONFLICT OF LAWS — DEATH BY WRONGFUL ACT.** — The Kansas statute giving damages for death by wrongful act prescribes that action shall be brought by the personal representatives of the deceased. In Missouri, action

can be brought by the wife. Plaintiff's husband, a citizen of Missouri, was killed while travelling in Kansas upon defendant railroad; but he left no property in Kansas. *Held*, that plaintiff could not recover in Missouri upon the Kansas statute. *Seemle*, that she had no possible remedy. She could not sue in either State upon the Missouri statute, because the accident did not occur within Missouri; there could not have been any recovery in Kansas upon the Kansas statute, because as deceased left no property in Kansas, no administrator could have been appointed there; nor, according to the law of that State, would an administrator appointed in Missouri have been recognized in Kansas. *Oates v. U. P. R. R. Co.*, 16 S. W. Rep. 487 (Mo.).

CONSTITUTIONAL LAW — ADVISORY OPINIONS. — Where a statute provides that a question which may be "about to rise" under an act of Parliament "may be submitted" to the High Court of Justice "for decision," the jurisdiction of that court is consultative only, not judicial. In such a case no appeal lies to the Court of Appeals. *Ex parte the County of Kent et al.* [1891], 1 Q. B. 725 (Eng.).

CONSTITUTIONAL LAW — AUSTRALIAN BALLOT ACT — EDUCATIONAL QUALIFICATION. — The constitution of Tennessee provides that every male citizen of the age of 21 years . . . shall be entitled to vote, and there shall be no qualification attached to the right of suffrage, except that each voter must have paid his poll-tax. *Held*, that a statute providing for a system of elections whereby the names of all the candidates are printed upon one ticket, and each voter is compelled to mark a cross opposite the name of each candidate for whom he wishes to vote, is not unconstitutional, as requiring an education qualification. *Cook v. State*, 16 S. W. Rep. 471 (Tenn.). It was on the contrary assumption that a similar bill was twice vetoed in New York.

CONSTITUTIONAL LAW — AUSTRALIAN BALLOTS — MARKING BALLOTS. — Where a statute required each voter to designate his choice by a cross mark placed in a sufficient margin at the right of the name of each candidate, and that no voter shall place any mark upon his ballot by which it may be afterwards identified, — *held* (on a question put by the Legislature), that the cross mark need not be placed *in the square* provided for that purpose at the right of each name, but that any mark other than a cross, or placed other than to the right of the name of the candidate voted for, nullifies the ballot. *In re Vote Marks*, 21 Atl. Rep. (R. I.) 962.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — A Maine statute (Rev. St. c. 24, § 50) requires common carriers who bring into the State persons not having a settlement therein to remove them beyond the State if they fall in distress within a year, provided that the town or city authorities requesting such removal deliver such persons at the station or on board the boat of such carrier. *Held*, that this is a regulation of foreign and interstate commerce, and is in violation of art. 1, § 8, cl. 3, of Constitution of United States, and is therefore void. *City of Bangor v. Smith*, 22 Atl. Rep. 379 (Me.).

CONSTITUTIONAL LAW — JURISDICTION OF CONSUL. — The Constitution of the United States, securing to citizens the right of trial by jury and requiring an indictment by a grand jury, does not give a citizen or a temporary subject the right to claim the guaranty when tried before a consul or tribunal, in accordance with a treaty for offences committed in a foreign country; nor does the fact that the offence is committed on an American vessel give the offender the right to invoke the guaranty on the ground that the deck of the vessel is territory of the United States. *Ross v. McIntyre*, 11 Sup. Ct. Rep. 897.

CONSTITUTIONAL LAW — LEGISLATIVE ACTS — DELEGATION OF POWER. — Under Pol. Code, Cal., §§ 2568, 2569, subd. 6, the board of harbor commissioners of the port of Eureka are empowered to make rules and regulations for the protection of navigation in Humboldt Bay, and to impose penalties up to a certain amount. *Held*, that the clause giving them the power to impose penalties is unconstitutional; since the Legislature cannot delegate such power to any other body. *Board of Harbor Commissioners of Port of Eureka v. Excelsior Redwood Co.*, 26 Pac. Rep. 375 (Cal.).

CONTRACT — WAIVER OF CONDITION — INSURANCE. — Where an insurance company, after the destruction of the property, denies all liability on the ground that the policy was void, it thereby in effect waives all its rights under certain stipulations in the policy requiring proofs of loss, etc., and sixty days within which to pay, and a suit

on the policy brought before the end of the sixty days is not premature. *Phenix Ins Co. of Brooklyn v. Weeks*, 26 Pac. Rep. 410 (Kan.).

**MUNICIPAL CORPORATIONS — QUARANTINE — RESTRAINT OF TRADE.** — In the absence of an epidemic showing an apparent necessity therefor, an ordinance prohibiting any one from bringing second-hand clothing into a town, or exposing it for sale therein, without furnishing proof to the mayor that it did not come from an infected district, is not a valid exercise of the charter power to establish and enforce quarantine regulations, but is an unreasonable restraint of trade. *Town of Kosciusko v. Slomberg*, 9 C So. Rep. 297 (Miss.).

**NEGLIGENCE — CONTRIBUTORY — DOCTRINE OF DAVIES v. MANN.** — Plaintiff a boy of 14, while standing still on one railroad track to await the passage of a train on another, was struck by an engine. *Held*, it was fatal error to charge that if plaintiff was standing on the track, and was neither looking nor listening for the approach of a train, and therein failed to exercise the care due from one of his age, yet if the bell of the approaching engine was not rung, and such failure to ring directly caused the accident, plaintiff could recover. *Dlaui v. St. Louis, I. M. & S. Ry. Co.*, 16 S. W. Rep. 281 (Mo.).

This case is squarely in conflict with *Davies v. Mann*, 10 M. & W. 546, as understood and followed in England.

**NEGLIGENCE — CONTRIBUTORY — TRESPASSERS.** — The defendant knew that many people were in the habit of crossing its tracks, and going under its stationary cars in the car-yard. This knowledge alone does not render the defendant liable in damages for an injury caused by a movement of the cars in the yard, due to the negligence of the defendant's servants in handling cars at a distance from the yard. *Central Ry. & Banking Co. v. Ryles*, 13 S. E. Rep. 584 (Ga.).

**PERSONAL PROPERTY — LIENS — INCONSISTENT DEFENCES.** — Where an administrator was sued for goods claimed to belong to the partnership of which the intestate had been a member, — *held*, that he, the administrator, could not, in his defence, at once claim the goods as belonging to the estate of the intestate, and set up a lien on them in his own favor. *Gardner v. Gilliam*, 26 Pac. Rep. 220 (Ore.).

**QUASI-CONTRACT — VOLUNTARY SERVICE.** — The plaintiff, who had a home of his own, was requested by his father to leave it, and live with and care for him, the father, promising to will him his farm. The plaintiff complied. The father soon afterwards became insane, and therefore unable to make the will. *Held*, the plaintiff may recover on a *quantum meruit* against the administrator of the father's estate. *Hudson v. Hudson*, 13 S. E. Rep. 583 (Ga.).

This decision seems inconsistent with the rules of quasi-contracts, there being clearly no implied promise on the part of the father to compensate the plaintiff otherwise than by will. *Osborne v. Guy's Hospital*, 2 Strange, 728, would seem to be in point. Clearly, the plaintiff in giving his services looked to a will alone for compensation.

**REAL PROPERTY — ADVERSE POSSESSION.** — Where one purchases, pays for, and receives possession of land under a parol contract of sale, the fact that he often demands a deed in accordance with the contract does not constitute such recognition of the vendor's title as will destroy the adverse character of his possession. *Newsome v. Snow*, 8 So. Rep. 377 (Ala.).

**REAL PROPERTY — AUSTRALIAN LAND TRANSFER SYSTEM.** — The Victorian "Transfer of Land Statute" protects those who deal with a proprietor whose name is upon the register. A forged a transfer of land owned by the plaintiff, to a fictitious and non-existent grantee, procured the transfer to be registered, and then forged a mortgage in the name of the fictitious grantee to the defendant. In executing the mortgage, A purported to act as agent for the fictitious mortgagor. *Held*, that the defendant got no title. Purchasers must ascertain at their peril the existence and identity of the grantor. The statute protects them merely from infirmities of title. *Gibbs v. Messer* [1891]. A. C. 248.

**TORT — CONSPIRACY — MALICE — INTERFERENCE WITH TRADE.** — On demurrer. Plaintiff, a butcher, alleged (a) that defendants, who were dealers in beef cattle, maliciously agreed among themselves not to trade with him; (b) that they maliciously persuaded another dealer not to trade with him. *Held*, that a civil action for conspiracy does not lie, except where defendants would have been liable separately; that plaintiff could not therefore recover on his first

ground of action, but that he could on his second. *Dels v. Winfree*, 16 S. W. Rep. 111 (Texas). Approving *Walker v. Cronin*, 107 Mass. 562.

**TORT — DECEIT — ACTUAL INTENT.** — Plaintiff, a depositor, sued defendant, president of a bank, for false representations as to the solvency of the bank, whereby plaintiff was induced not to withdraw his deposit, and consequently lost it. *Held*, a charge to the jury was erroneous which stated that plaintiff must prove defendant to have intended to deceive; defendant was liable, whatever his intent, if by the exercise of ordinary care he might have ascertained that his statements were false. *Giddings et al. v. Baker et al.*, 16 S. W. Rep. 33 (Texas).

This case is directly opposed to the English law, as settled in 1887 by the House of Lords in *Pesk v. Derry*, L. R. 14 App. Cas. 337; and also contrary to the weight of American authority. See *Cowley v. Smith*, 46 N. J. Law, 380 (1884).

**TORTS — FORCIBLE ENTRY — INJURY TO FURNITURE.** — The plaintiff, a tenant of defendant's house, wrongfully refused to give up possession on the expiration of his tenancy. The defendant, desiring to rebuild, sent workmen to remove the roof; in such removal, without any personal violence, certain tiles fell on plaintiff's furniture in the room below and damaged it. *Held*, that the defendant was not liable in trespass. *Beddall v. Maitland*, 17 Ch. D. 174, distinguished on the ground that, in that case, the damage was done in the course of a forcible entry within the penal statute; while here, what was done did not amount to a forcible entry. *Jones v. Foley* [1891], 1 Q. B. 730 (Eng.).

It is hard to see the distinction between this case and *Beddall v. Maitland*. It is submitted that the question depends, not so much on the nature of the entry, as on the fact of the owner being in or out of possession.

**TORTS — MALICIOUS INSTITUTION OF CIVIL SUIT — SLANDER — PRIVILEGED COMMUNICATION.** — Where B brings an action of slander against A, and afterward voluntarily discontinues it, — *held*, that in order to give A an action for malicious institution of a civil suit, it is not necessary that either his person should have been arrested or his goods seized. (Cf. Cooley on Torts, 2d ed., 217, *contra*.)

*Semble*, that when a voter says in conversation with other voters that B, a candidate for office, has stolen horses, it is not a privileged communication. *Smith v. Burrus*, 16 S. W. Rep. 881 (Mo.).

**TRUSTS — PRIOR EQUITY — PURCHASE FOR VALUE.** — B, holding shares in trust for the plaintiffs, pledged them with the defendant for a private debt. The defendant had no notice of the trust. After learning of it he applied to the company, which had been notified of the trust, to have the transfer registered. By the articles of association no transfer of stock could be made unless approved by the directors. Upon this ground, — *held*, that the plaintiff's prior equity must prevail. The second claimant must be able to show a complete legal title, or at least that all the formalities have been complied with, so that nothing more than a purely ministerial act remains to be done. *Moore v. Northwestern Bank* [1891], 2 Ch. 599.

This case adopts the true test, and is plainly distinguishable from *Dodds v. Hills*, 2 Hem. & Mill. 424. In that case the company could not object to the transfer of the shares, and accordingly the pledgee immediately upon the transfer of the certificates to himself got a complete legal right, — an irrevocable power of attorney which entitled him to demand absolutely the transfer to himself upon the books of the company. Here he got no such complete legal right, and the company could not approve the transfer without assisting in the fraud.

**USURY — INTEREST AS PENALTY.** — Where one agreed to pay interest at the rate of six per cent, but in case payments were not made promptly, then the principal was to draw ten per cent, — *held*, that the agreement to pay increased interest in case of default was in the nature of a penalty, and did not taint the original contract with usury. *Upton v. O'Donahue*, 49 N. W. Rep. 267 (Neb.).

**WILLS — UNDUE INFLUENCE — BURDEN OF PROOF.** — Where a beneficiary has a testator under his control with power to make his will the will of the testator, especially in a case where the testator has made an unnatural disposition of his property, the court presumes that the beneficiary has used undue influence, and puts on him the burden of showing that he did not influence the testator. "Whatever constrains a person to do what is against his will, and what he would not do if left to himself, is undue influence, no matter by what means the control is exercised." *Carroll v. Hulse*, 22 Atl. Rep. 191 (N. J.).

## REVIEW.

---

**ELEMENTS OF THE LAW OF TORTS.** Fourth edition, by Melville M. Bigelow, Ph.D., of Boston University Law School. Boston: Little, Brown, and Company, 1891. pp. 382.

In this fourth edition Dr. Bigelow has carefully and thoroughly revised and enlarged his former work on the general lines of the edition prepared for the University of Cambridge, England. The introduction and the chapter on Malicious Interference with Contract are entirely new. In the introduction the author defines a tort, and then explains fully each part of the definition. He also makes clear the position which the law of torts occupies with relation to the other sub-divisions of the law, overlapping, as it does, the law of contracts on the one side and the criminal law on the other, but lying, for the most part, between these two extremes.

The chapter on Malicious Interference with Contract states concisely and clearly the law on this comparatively recent branch of the subject.

The author has carefully classified the special torts, and the same method is used in the treatment of each, and was adopted in the former editions. The precise duty violated in each particular instance is clearly stated, thus emphasizing the tort itself rather than the object of the tort, as is commonly done on books on this subject. Dr. Bigelow, from his long experience as a lecturer in one of our leading law schools, has been enabled to produce in this work a book which will be a great help to any student of the law.

---

## LEADING ARTICLES IN EXCHANGES.

---

**Law Quarterly Review.** Vol. 7. London. Stevens & Son.

No. 28. Natural Law and the Bering Sea Question. American and British Systems of Patent Law. Wrongful Intimidation.

**Yale Law Journal.** Vol. 1. New Haven.

No. 1. Voting-Trusts. Natural Right of Property in Intellectual Production. Secret Ballot.

**Washington Law Reporter.** Vol. 19.

No. 44. Dissenting Opinions.

**Western Law Times.** Vol. 2.

No. 7. Disbarring of Barristers.

**The Counsellor.** Vol. 1. New York Law School, N. Y.

No. 1. Portrait of T. W. Dwight. Evolution of a Debt. Ought Juries to be abolished.

**Columbia Law Times.** Vol. 5. New York.

No. 1. Police Power of Federal Union and the States. Certification of a Check.

**The Green Bag.** Vol. 13. Boston.

No. 10. Sir Edward Clarke (with portrait). Jury System in Civil Cases. Supreme Court of New Jersey (with portraits). Mediæval Punishments.

**Central Law Journal.** Vol. 33. St. Louis.

No. 17. "Wholly Destroyed" in Fire Insurance Policies.

**Irish Law Times.** Vol. 25.

No. 1291. Remedies for Breach of Covenant in Lease. Maintenance of Infants. Laxity of Expression in Wills.



# HARVARD LAW REVIEW.

---

VOL. V.

DECEMBER 15, 1891.

No. 5.

---

## THE VALIDITY OF ATTACHMENTS MADE ABROAD BY CREDITORS OF AN INSOLVENT DEBTOR.

---

**I**N a widely extended business it frequently happens that the assets of the business are situated in several jurisdictions and debts are due to and by citizens of several countries; so that upon the bankruptcy of those carrying on the business, difficult questions arise concerning the effect in foreign jurisdictions of the action of the bankruptcy court of the bankrupts' domicile.

Such questions have been discussed by writers on international law and the conflict of laws for a long time, and many points have become settled either by statutory provisions or by judicial decisions. Thus in all civilized countries foreign creditors stand on quite or nearly the same footing as domestic ones, as regards the proof of claims. And on the continent of Europe generally, on proof that judgment of bankruptcy has been rendered against the debtor in his domicile, foreign courts will order payment or delivery of the debtor's property situated within their jurisdiction to the assignees in bankruptcy, free from any liens of creditors made after the bankruptcy. In England, also, so far as chattels and choses in action are concerned, the rights of a foreign assignee in bankruptcy are recognized as controlling from the date of the bankruptcy.

It may happen, however, either from considerations of con-

venience or because of the unsatisfactory remedy afforded in a foreign court, that an assignee under an English bankruptcy prefers to enforce his rights in an English court to the property of the bankrupt situated abroad, if that court can obtain jurisdiction. If, for instance, an English creditor on learning of the bankruptcy has obtained full satisfaction of his debt out of property of the bankrupt situated abroad, the assignee may be able to pursue his remedy at home, as the English court has jurisdiction over the English creditor. In such cases the distinction is taken between property which would have come into the hands of the assignee for distribution among the general creditors and that which would not have become thus available for distribution. If an English creditor gets possession of property of the latter class, he may retain it and still prove his debt, but otherwise in regard to property of the former class. The principle is thus stated by Baron Parke in the case of *Cockerell v. Dickens*, 3 Mo. P. C. 132: "If the real estate in Java did not pass by the assignment . . . nor could in any way be got hold of and made available by the assignees for the payment of the general creditors, any individual creditor who could obtain it by due course of law would have a right to hold it, and if he duly proved the debt due to him before he had been paid any part of the debt so proved by means of that estate, he would be entitled to receive the dividends under the insolvent estate until he had been paid altogether twenty shillings in the pound, exactly in the same way as if a creditor had had a security on the real estate or personal credit of a third person. In this case he could neither be compelled to refund the money obtained by means of the real estate or the dividends received on the debt, or be restrained from receiving those hereafter to become due. The principle is that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors and at the same time be allowed to come in *pari passu* with the other creditors for satisfaction out of the remainder of that fund; and this principle does not apply where that creditor obtains by his diligence something which did not and could not form a part of that fund."

As an English bankruptcy is ordinarily held not to affect the title to real estate, an English creditor may usually retain an advantage secured by an execution or attachment of real estate of his debtor situated abroad, while an advantage secured by attach-

ment or execution of movables must be surrendered.<sup>1</sup> If execution be levied or even an attachment made before the bankruptcy, the creditor may, however, retain the advantage which he has thereby gained, for the English bankruptcy law seeks only to vest in the assignee title to the bankrupt's property as it existed at the time of the bankruptcy and subject to all liens and equities existing at the time. Where a bankruptcy and an attachment abroad of the bankrupt's property there by an English creditor took place on the same day, Lord Eldon allowed an inquiry to be made as to the hour of the day when each took place, for the purpose of determining priority.<sup>2</sup>

If a foreign creditor, by attachment or execution levied on movable property of an English bankrupt situated outside of England, secures payment of his claim, he can retain the advantage thus gained. He is not a subject of England, and therefore not bound by the English bankruptcy law. But if such a creditor, not having been able to collect the full amount of his claims from property of his debtor situated outside of England, wishes to prove the amount remaining unpaid, he will be allowed to do so only upon accounting for what he has received abroad. He need not come into the English court unless he wishes, but if he elects so to do, he must come in upon the same footing as all other creditors and be content with the same dividend.<sup>3</sup>

In this country the principles laid down by the English courts as just set forth would doubtless be generally accepted so far as the United States Constitution does not prevent, and the facts that each State is a separate jurisdiction and that a large business is often carried on to a greater or less extent in half of the United States tend to increase the importance of these principles. A provision in the Massachusetts Insolvency Law in regard to attachments has led to a further development of the law in that State. The Massachusetts statute provides that the assignment shall vest in the assignee not only "all the property of the debtor as of the time of the first publication of the notice of issuing the warrant in case of voluntary proceedings, and at the time of the

---

<sup>1</sup> *Hunter v. Potts*, 4 T. R. 182; *Sill v. Worswick*, 1 H. Bl. 665; *Phillips v. Hunter* 2 H. Bl. 402.

<sup>2</sup> *Ex parte Dobree*, *Ex parte Le Mesurier*, 8 Ves. 82.

<sup>3</sup> *Selkrigg v. Davis*, 2 Dow, 230; s. c. 2 Rose, 291; *Ex parte Wilson*, L. R. 7 Ch. 490; *Banco de Portugal v. Waddell*, 5 App. Cas. 161; *Re Bugbee*, 9 N. B. R. 258.

first publication of notice of the filing of the petition in case of involuntary proceedings," but shall also "be effectual . . . to dissolve any attachment on mesne process made not more than four months prior to the time of the first publication aforesaid."<sup>1</sup> The national bankruptcy act contained a similar provision.<sup>2</sup>

On the strength of this provision an attempt was made in 1861, in the case of *Dehon v. Foster*,<sup>3</sup> to enjoin the defendant (a Massachusetts creditor of a Massachusetts bankrupt), who had before the insolvency made an attachment in Pennsylvania, from prosecuting his action to judgment and thereby reaping the benefit of his attachment. The case came up first on demurrer to the bill. It was argued exhaustively by eminent counsel on both sides, and upon careful consideration the demurrer was overruled, and subsequently the perpetual injunction sought by the plaintiff was granted. The case chiefly relied on by the court to support its decision overruling the demurrer was *Mackintosh v. Ogilvie*.<sup>4</sup> That case is obscurely reported, but apparently the defendant, a creditor, had made "arrestments" in Scotland of debts due the bankrupt there before the bankruptcy, but had not obtained "sentence" there till after the bankruptcy.

Lord Hardwicke granted a writ of *ne exeat* to prevent the defendant from leaving England, as it was alleged he was intending to do in order to escape suit by the assignees, and refused to discharge the writ unless the defendant gave security to abide the event of the cause.

Arrestment seems to be in the nature of a judicial proceeding, and to require an order of court enjoining the debtor from paying his creditor till the debt due the arrester has been satisfied.<sup>5</sup> If we can understand by the "sentence" referred to this order of injunction, it seems that it might well be held that the lien of the arrestment attached only from the latter date. This view is given color by the remark of the Lord Chancellor, Hardwicke, "It is then like a *subsequent* foreign attachment by the custom of London." And the case has generally been regarded as authority only for the point that a subsequent attachment abroad could not prevail against the assignees in an English bankruptcy.<sup>6</sup>

<sup>1</sup> Pub. Stat. c. 157, § 46.

<sup>2</sup> Rev. Stat. § 5044.

<sup>3</sup> 4 Allen, 545; 7 Allen, 57.

<sup>4</sup> 3 Swanst. 365, n.; S. C. 4 T. R. 193, n.; S. C. Dickens, 119.

<sup>5</sup> Erskine's Inst., Title VI. § 2.

<sup>6</sup> See, e.g., *Phillips v. Hunter*, 2 H. Bl. 402, 407; *Westlake, Private Internat. Law*, 150.

If the case is to be understood, however, as deciding that the title of such assignees would prevail over an attachment perfected abroad before the bankruptcy, it certainly has not represented the law of England for a century.<sup>1</sup>

It is perfectly clear that an English court would not enjoin an English creditor from obtaining the fruits of an attachment made before the bankruptcy, and the decision in *Dehon v. Foster* must rest entirely on the provision of the Massachusetts law dissolving attachments. That law does not purport to dissolve attachments made without the State, and in this differs from the provisions in all bankrupt laws vesting the title in the bankrupt's property in the assignees. Nor would the courts of another State on any principle of comity give an extra-territorial effect to the Massachusetts law dissolving attachments<sup>2</sup> as they would to the law vesting title to the bankrupt's movables in his assignee, with the limitation that it would not be allowed to operate injuriously to the citizens of the State whose laws are invoked to carry it into effect.

The decision in *Dehon v. Foster* must therefore be regarded as a distinct step in advance of the English law. The court meets this as follows: "To the suggestion that the attachment of the defendants was prior in point of time to the institution of the proceedings in insolvency, the answer is, that, on the facts stated in the bill, such priority does not impair the plaintiff's equity. We doubt very much whether the fact would be at all material, even if the attachment was made *bona fide*, and without any intent to defeat the operation of our insolvent laws; because it tends to contravene the clear intent of our statutes, which aim to vest in the assignee all the property of the debtor which could have been assigned by him or taken on execution against him at the time of the commencement of insolvent proceedings, 'although the same is then attached on mesne process as the property of the debtor.'

---

<sup>1</sup> Cook's Bankrupt Laws, 6th ed., 326; *Ex parte Dobree*, *Ex parte Le Mesurier*, 8 Ves. 82; *Re Chapman*, L. R. 15 Eq. 75.

<sup>2</sup> *Kidder v. Tufts*, 48 N. H. 121. In this case it was held that citizens of Massachusetts who had attached property in New Hampshire and were prosecuting their attachments to judgment after proceedings in insolvency had been instituted in Massachusetts against their debtor were entitled to do so, and that any remedy must be in the form of an injunction by the Massachusetts court against its own citizens. See, also, *Pane v. Lester*, 44 Conn. 196; *Rhawn v. Pearce*, 110 Ill. 350; *Hibernia National Bank v. Lacombe*, 84 N. Y. 367.

It is true that it does not in terms provide that an attachment in other States shall be dissolved, because such an enactment would be without the force of law, as against attachments which are valid according to the laws of the place where they are made. But they nevertheless operate to divert property from the assignees and create preferences, and so are against equity as between citizens of our own State." The court adds that it further appeared from the bill that the defendants, when they made their attachment, knew that the debtors were insolvent, and had reason to believe that proceedings in insolvency were about to be instituted against them, and that this "purpose to interfere with and prevent the proper distribution of the property of the insolvent takes away all claim to equitable consideration which might exist when priority was obtained in good faith." But subsequently, in making the injunction perpetual, the court held — "The intent with which the defendants made the attachment does not affect the equitable right of the assignees."<sup>1</sup>

While it may be thought that the rule laid down in *Dehon v. Foster* is somewhat in the nature of judicial legislation, inasmuch as under this rule the courts practically give a certain extra-territorial force to the Insolvency Law which it would not otherwise have either by virtue of the statute itself or by comity, yet it is true, as the court says, that making such attachments or garnishments in another State is contrary to the spirit and intent of the Insolvent Law, which seeks to vest in the assignee all of the bankrupt's property free from attachments not more than four months old, and that for a creditor to go from his own jurisdiction and that of his debtor into a foreign jurisdiction, to acquire an advantage expressly and purposely denied him in the former, is an attempt to evade the law of the State of which he is a subject. Further, it cannot be doubted that the operation and effect of the rule have been extremely beneficial. It has forced creditors to come into the Insolvency Court and prove their claims. Without it, on the first intimation of a failure, there would be a general scramble of creditors to lay hold of something outside the State by garnishment or attachment; much of the estate would be wasted in legal costs and otherwise; for a creditor who has attached property to the value of ten thousand dollars to secure a claim of five thou-

---

<sup>1</sup> *Dehon v. Foster*, 7 Allen, 57.

sand dollars has no object in realizing more than five thousand dollars and costs from the property attached. The greatest inequality would prevail among the creditors; and by a little information to favored creditors a bankrupt could in effect prefer them, without having made what would in law constitute a preference. In view of these considerations of law and fact, the case of *Dehon v. Foster* seems to have been well decided. It certainly is no greater stretch of the powers of a court of equity than English Chancellors in earlier days often made in support of what they conceived to be just. The case has been somewhat followed in this country in an analogous class of cases in which a creditor, with a view to evade the exemption laws of the State where he and his debtor reside, makes an attachment or garnishment in another State of goods or credits of his debtor which are exempt from attachment or execution in the State where both parties are domiciled. It has been held in Indiana,<sup>1</sup> Kansas,<sup>2</sup> Maryland,<sup>3</sup> and Ohio<sup>4</sup> that the creditor may be enjoined in the State of his domicile from prosecuting such an attachment.

Twenty years after the decision in *Dehon v. Foster*, the case of *Lawrence v. Batcheller*<sup>5</sup> arose. This was similar in its facts to the earlier case, with the additional circumstance that the creditor, after the insolvency, and before action brought by the assignees, had obtained judgments and collected the amount of his claim by means of garnishments made, as in *Dehon v. Foster*, shortly before the insolvency, and with knowledge that it was likely to occur. The action was an action of contract to recover the amount so collected by the creditor. It was decided by the court that the plaintiffs could not recover. The grounds on which the court decided the case were in substance that the case was not within the statutes, for no reference was made in them to attachments outside the State; nor within the English precedents, for they allowed a recovery only when the attachments were subsequent to the bankruptcy; nor within the principle of *Dehon v. Foster*, for reasons which the court stated as follows: "The argument of the plaintiffs in the case at bar is, that, as it was contrary to equity for the defendant to proceed with his suits to judgments, and to a satisfaction of the judgments from the funds attached, so it is contrary to

<sup>1</sup> *Wilson v. Joseph*, 107 Ind. 490.

<sup>2</sup> *Zimmerman v. Franke*, 34 Kas. 650.

<sup>3</sup> *Keyser v. Rice*, 47 Md. 203.

<sup>4</sup> *Snook v. Snetzer*, 25 Ohio St. 516.

<sup>5</sup> *Lawrence v. Batcheller*, 131 Mass. 504.

equity for him to retain the money so obtained; and that they can maintain an action at law against the defendant for money had and received to their use, because the money *ex æquo et bono* belongs to them. This argument rests on the assumption that courts of law will afford a remedy in damages for all wrongs done, which courts of equity, if seasonably applied to, will prevent; but this is not true. Courts of equity recognize and enforce rights which courts of law do not recognize at all; and it is often on this ground that defendants in equity are enjoined from prosecuting actions at law."

The grounds of distinction thus suggested it is believed are untenable. If it was so inequitable for the defendant to proceed with his suits to judgment that a court of equity would enjoin him from so doing, his obtaining judgments and satisfying them would not better his position. He would hold the amount so collected as a constructive trustee. If it was inequitable to acquire the money it was inequitable to hold the money. Where parties have equal equities or are *in pari delicto*, the acquisition of the legal title determines their respective rights, but only in those cases. And as to the remedy being at law, where a plaintiff seeks to recover a liquidated amount from a constructive trustee, the count of money had and received is a proper remedy,<sup>1</sup> and the action of contract under the Massachusetts Practice Act includes this.

There is, however, another ground suggested for the decision: "It is, to say the least, doubtful if the regularity of the proceedings in those actions in reference to the attachments and the conclusiveness of the judgments charging the garnishees therein can be called in question in this suit. *Green v. Van Buskirk*, 5 Wall. 307, and 7 Wall. 139."

In *Green v. Van Buskirk*, one Bates, who lived in New York, executed and delivered to Van Buskirk, who lived in the same State, a chattel mortgage of safes situated in Chicago. Later, Green, also a citizen of New York, in ignorance of the mortgage, attached the safes in Illinois as the property of Bates, and having obtained judgment, satisfied it from the proceeds of the safes.

---

<sup>1</sup> *Buttrick v. King*, 7 Met. 20; *Sewell v. Patch*, 132 Mass. 326.

In the former case, Shaw, C. J., thus expresses this principle: "But when it (the property sought to be recovered) remains wholly in money in the hands of the defendant . . . an action for money had and received—*which is in the nature of a bill in equity*—when nothing remains to be done, but the payment of money, may be maintained.



Van Buskirk was not a party to the action, but he might have made himself such. By the law of Illinois, unrecorded chattel mortgages were void against third persons. Van Buskirk subsequently brought an action in New York to recover the proceeds of the safes obtained by Green by means of his attachment in Illinois. The New York court rendered judgment in favor of Van Buskirk, and on writ of error the case was carried to the Supreme Court of the United States, and the decision reversed on the ground that full faith and credit had not been given to judicial proceedings in Illinois.

It seems impossible to distinguish the case of *Lawrence v. Batcheller* from *Green v. Van Buskirk*. It seems clear that the Supreme Court of the United States would have reversed the decision of the Massachusetts court had the latter decreed that the defendant should pay over the amount collected by him in other States, on the ground that such a decree amounted in effect to a reversal by the court of one State of the judgment of the court of another; and the decision should be rested solely on constitutional grounds.

It has been decided in a recent case in the Supreme Court of the United States<sup>1</sup> that it is not unconstitutional to enjoin prosecuting an attachment suit in another State, as was done in *Dehon v. Foster*, though it was argued that in so enjoining an attachment the court was refusing to give credit to a lien granted by another State. This argument was met by the opinion of the majority of the court delivered by Chief Justice Fuller, thus: "The lien is inchoate and the property attached held to await the result of the suit. If a judgment for the plaintiff is obtained, the lien becomes perfected and the property is applied to satisfy the judgment. If plaintiff fails in his action the lien falls with it. And he may so fail by reason of the discharge of the defendant in insolvency, when he is a citizen of the same State, or has made himself a party to the proceedings in insolvency, or by the action of other courts of the State where the suit is pending, or elsewhere, if jurisdiction *in personam* be obtained."<sup>2</sup> Justice Miller, with whom concurred Justices Field and Harlan, wrote a vigorous dissenting opinion. Both opinions indicate that had the creditor collected his debt he could not have been deprived of his advantage.

---

<sup>1</sup> *Cole v. Cunningham*, 133 U. S. 107.

<sup>2</sup> 133 U. S. 107, 116.

In spite of the rule established by *Lawrence v. Batcheller* and confirmed on constitutional grounds, that if a creditor had actually collected, though after bankruptcy, the amount of a judgment from property of his insolvent debtor situated outside the State he could retain it, assignees in Massachusetts were generally enabled to prevent such advantages from being obtained. If a creditor had not obtained his foreign judgment before the bankruptcy, he would rarely be able to obtain it afterwards, as the assignee would usually be able to file a bill in equity praying for an injunction within a few days from the date of bankruptcy.

Attempts were made by creditors to escape from the liability to injunction, and to bring attachments and garnishments made by them on the eve of the bankruptcy of their debtor within the protection of the United States Constitution. Thus in *Cunningham v. Butler*, 142 Mass. 47, the creditors made without consideration an assignment of their claim to a citizen of the State where the attachment was sought, and an attachment was then made—all before the beginning of insolvency proceedings. On a bill to enjoin the attachment suits filed by the assignees against the creditors, the court found as a fact that those suits were still subject to the control of the defendants, the creditors, and therefore held that the case was indistinguishable from *Dehon v. Foster*, and granted an injunction.

Again, in *Proctor v. The National Bank of the Republic*, 152 Mass. 223, the same attempt was made, and this time more successfully. Instead of making a colorable assignment of its claim, the creditor, the National Bank of the Republic, made an absolute assignment, and relinquished all its rights to the attachment suit which it had begun; giving, however, a guarantee to make good to the purchaser any deficit in the amount collected, and also all costs of prosecuting the attachment suit. It was held that the assignees were without remedy; that the guarantee was a collateral agreement not affecting the title of the purchaser of the claim; that, therefore, an injunction against the defendant would be useless, as it had not control of the attachment suit, and that on the question of recovering the value received by the defendant for its sale—not simply of its claim, but of its attachment—the case fell within the principle of *Lawrence v. Batcheller*.

The correctness of the decision can hardly be questioned, but the result is none the less to be regretted. It is usually possible

for a creditor having a good commercial rating to give a satisfactory guarantee, and by so doing make a sale of his claim, as in *Proctor v. The National Bank of the Republic*, thereby reaping the fruits of an attachment or garnishment hastily made beyond the limits of the State. The class of creditors who will gain most will be the class who could best endure a loss; namely, those having a large capital and extended business connections. Creditors in general will not receive so much from insolvent debtors as formerly, and the loss will fall with most certainty on those who have not sufficient credit to enable them to make hastily such a sale as is now under consideration — the very ones to whom the loss of a percentage of their claims is of greatest importance.

Numerous minor questions bearing on this topic are arising, and are likely to continue to arise, in Massachusetts. For instance, Can a creditor, having obtained an advantage, as in *Lawrence v. Batcheller* or *Proctor v. The National Bank of the Republic*, subsequently prove other claims in the Insolvency Court on the same footing as other creditors? Will the court grant an injunction at the suit of a debtor who has made a composition with his creditors under the statute authorizing that mode of settlement? How far will the fact that an injunction of the attaching creditor will probably cause an attachment to be made by a foreign creditor, who cannot be enjoined, affect the case? And will the court grant a mandatory injunction in such a case, ordering the attachment suit to be prosecuted to judgment for the benefit of the assignees?

But, however these points may be decided, it is now impossible to prevent an active and well-advised creditor who is able to give a satisfactory guarantee from obtaining an advantage at the expense of other creditors. The only conclusion to be drawn is that satisfactory distribution of property in bankruptcy can only be made by means of a National Bankruptcy Act.

*Samuel Williston.*

## GRATUITOUS UNDERTAKINGS.

THE ordinary division of personal actions between torts and contracts has long been regarded, in our law, as inadequate. Lately there has been a determined and probably successful attempt to revive the phrase *quasi-contract*, which was feebly put forward two centuries ago;<sup>1</sup> and the phrase *quasi-tort*, before, I think, unknown to the common law, has been somewhat affected. But about these phrases there is an air of strangeness; they are fantastic habits of a continental cut, which seem ill suited to the sturdy limbs of the Common Law. One cannot help feeling that they conceal some native principles of our law which should be recognized, and recognized under English names.

A contract is a right which A has (*in personam*) against B, because B has consented, for a consideration, or in some formal manner, to assume the correlative duty. A tort is a violation of a right which A has (*in rem*) against B, equally with all others, because society has decreed that the corresponding duty should be laid upon every member of it. Between these classes of rights exists a third; which, unlike a tort, depends upon some voluntary act by B, by which he undertakes a duty, and, unlike a contract, does not depend upon any promise of B, but only upon the mutual relations of A and B. In other words, B assumes a duty merely by voluntarily entering into a new relation towards A.

To create such a right and duty no consideration need be shown, since no contract is necessary. As a matter of fact, entrance into such a relationship is often the occasion of a contract, which may to some extent supersede the principles of the common law, and govern the rights and duties of the parties. Thus, in case of carriage, some of the rights of the parties are often secured by a contract, — the bill of lading. But even in these cases the terms of the contract seldom embrace the whole transaction. In order to avoid complications, however, I shall consider cases where the relationship is gratuitous, so that the principles of law cannot be modified by contract; but the same principles govern

---

<sup>1</sup> *E.g.*, by Lord Mansfield in *Moses v. Macfarlane*, 2 Burr. 1005.

all relationships, except so far as they are superseded by the express provisions of some contract. There is no technical name for these rights. In the old law, action for the breach of such a right was induced by an *assumpsit*, or, as it should be translated in such a case, *he undertook*.<sup>1</sup> Following this old use, which is by no means uncommon to-day, I shall call a right of this sort an undertaking. The subject naturally falls into two parts: first, is there such a third division of rights, distinct from rights *ex contractu* and rights *ex delicto*? second, what are the principles governing gratuitous undertakings?

## I.

An undertaking is the entrance of two parties into such relationship as that one party, on account of the bare relationship unaided by any agreement, has a new duty to perform toward the other; he *undertakes* a new duty. The definition may be rendered clearer by some examples of gratuitous undertaking. A's sheep falls into the river; B, seeing it, undertakes to rescue it. Before the undertaking, B has no duty toward A in the matter; but as soon as he actually enters upon the task of rescue, he must perform it with proper diligence. Any negligence by which the sheep is injured would render him liable to A; so would a negligent abandonment of the rescue when it was almost certain to succeed. A falls senseless in the street; B, a passing physician, undertakes to cure him. B might have passed by and left A to his fate; but having undertaken the work, he is liable for any negligence, either of commission or of omission. C sends a message to A by the B telegraph company. If the company receives the message to transmit, it is liable to A for any damage caused by negligent transmission. C pays A's fare on the cars of the B railroad company; the company negligently allows a robber to steal A's pocketbook. The company is liable for its failure to guard A.

All these are cases where the relationship between the parties was voluntary; in none of them is there any contract, and in most of them the liability of B could not arise from any tort,

---

<sup>1</sup> " *Assumpsit* does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself." Holt, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 909, 919.

properly so called. One of the most important classes of undertakings, however, is bailments; and for a long time it was held that every bailment included a contract. There has lately been a determined effort to controvert that doctrine, which is certainly untenable with regard to gratuitous bailments, because there is no consideration to support a contract. It is urged that the giving up of the goods by the bailor is sufficient. But so far from being a detriment, this is usually a benefit to the bailor; it secures protection to the goods for the bailor, but gives the bailee no right to use for any purpose. Even the element of mutual assent is not necessary. B, for instance, finds A's pocket-book in the street, and takes it up for the benefit of the owner; it is absurd to say that B promises the unknown owner, in consideration of being allowed to pick it up, to find him out and return it in good condition, and that such a promise is agreed to by A. Yet that is the absurdity to which we are brought by the ordinary doctrine of bailment. It is clear that there is really no contract in the case, at least, of gratuitous bailment, but that the rights and liabilities of the parties are regulated merely by the bailee's undertaking to hold the property.

It is equally true that the violation of an undertaking is not a tort, properly so called. It is a careful and exact use of legal language to call an undertaking a consensual obligation; it is a burden into which the obligor must voluntarily enter. One has only to be born or to immigrate into a society, in order to undergo the duty of respecting the persons and property of his neighbors; but in order to be required to exercise the active care required of an undertaker, the obligor must "take the trust upon himself."

The distinction is recognized in the law of damages. Where goods in the possession of a carrier are destroyed by a stranger, the act of the latter is a tort, and the measure of the damages he must pay is the value of the goods at the time and place of destruction; the owner could collect only that amount, though the wrongdoer knew of the destination of the goods. But if instead of suing the stranger, the owner brought action against the carrier, the value would be taken at the time and place of delivery, whether the form of action was tort or contract. This must be on the ground that the carrier's obligation was there violated; but clearly there was no tort there committed, for the property never came there.

It seems, then, that in all such cases the liability of the party at fault is to be decided by certain principles of the common law, distinct from those governing liability in cases of tort or breach of contract, which should be grouped together into another division of personal rights, coördinate with torts and contracts. It is true that such a division of personal actions has never been explicitly recognized in our law. But before the present division of actions into torts and contracts, a somewhat similar state of affairs prevailed. There seems at one time to have been a three-fold division of personal actions into (1) trespass, and trespass on the case; (2) case induced by *assumpsit*; (3) covenant.<sup>1</sup> Actions on the case induced by *assumpsit* included not only breaches of simple contracts, but also breaches of gratuitous undertakings,<sup>2</sup> which therefore in their origin are more nearly allied to simple contracts than to torts. When those actions in which the *assumpsit* was merely an inducement were differentiated from those in which it was the gist of the action, the former would properly have united with the old action of detinue, founded on bailment, to make up the grand division of undertakings; just as the latter united with actions of debt and covenant to form the grand division of contracts. Bailments, however, were after a struggle drawn off into the division of contracts; and the few other cases of undertaking then known, not being of sufficient importance to form a separate division, either followed bailments, or with other actions on the case sank back into the division of torts. This fact, singular as it is, may be accounted for by the well-known early neglect of all rights that did not concern tangible property. Injuries to intangible property might, it is true, be redressed after the statute of Westminster II. by an action on the case. But the recognition of such injuries was a gradual process; and before such as were in the nature of breaches of undertaking were recognized, the twofold division of actions was fully established. Thus the earliest sorts of undertaking recognized were those of a farrier,<sup>3</sup> surgeon,<sup>4</sup> innkeeper as to the *goods* of the guest,<sup>5</sup> carrier,<sup>6</sup> and bailee.<sup>7</sup> It is only recently that such

<sup>1</sup> 43 Ed. III. 33, pl. 38; 11 Hen. IV. 33.

<sup>2</sup> 46 Ed. III. 19, pl. 19.

<sup>3</sup> 42 Ed. III. 11, 13; 42 Lib. Ass. 260, pl. 17.

<sup>4</sup> 8 Ed. II. 275.

<sup>5</sup> 2 H. IV. 3, pl. 9.

<sup>6</sup> 48 Ed. III. 6, pl. 11.

<sup>7</sup> Y. B. 22 Ass. 94, pl. 41.

undertakings as those of telegraph companies<sup>1</sup> and passenger carriers,<sup>2</sup> which concern intangible rights, have been enforced apart from contract.

It is to be noticed at the outset that there are two classes of undertakers: private undertakers, who assume a duty *pro hac vice*, and public or "common" undertakers,<sup>3</sup> whose business it is to assume the duty. It might be said that the latter undertake a duty to all the world at the time they enter into their public calling; and that a breach of such a duty as that sounds rather in tort than in undertaking, if I may use the phrase. But this seeming duty to all the world is of limited application. Generally, it requires a special relationship to give rise to a right of action. A railroad company is under no different obligation as to the world at large from that of the private owner of a carriage who invites his friend to ride. There is only one exception to this statement; that of the public duty of an innkeeper, common carrier, and anciently a common farrier, to receive every applicant that can be served. But this duty differs entirely from the duty toward the customer after the relation between them is actually undertaken. It depends upon the so-called "custom of England," is grounded on public policy, and a breach of it does indeed sound only in tort.<sup>4</sup> If we except this duty, and the anomalous liability of a common carrier "as an insurer," the obligations of both public and private undertakers are governed by the same rules.

## II.

From a practical point of view, the theory here advanced is an important aid in the exceedingly difficult and delicate matter of ascertaining the degree of care required of one who undertakes a duty. This matter has caused much difficulty. On the one hand, the mooted distinction between gross and ordinary negligence in cases of bailment is involved; on the other, the question, What

<sup>1</sup> *N. Y. & W. P. Tel. Co. v. Dryburg*, 35 Pa. 298; *contra*, *Playford v. U. K. Tel. Co.*, L. R. 4 Q. B. 706.

<sup>2</sup> *Foulkes v. Met. Dist. Ry.*, 5 C. P. Div. 157; *contra*, *Alton v. Midland Ry.*, 19 C. B. N. S. 213.

<sup>3</sup> The word "common," now restricted to carriers, was formerly applied to all who exercised a public profession: common innkeeper, 11 H. IV. 45; common surgeon or farrier, 19 H. VI. 49; common hoyman, 2 Ld. Raym. 909, 918; common hackney-coachman, 2 Show. 127.

<sup>4</sup> *Jackson v. Rogers*, 2 Show. 327; *Heirn v. McCaughan*, 32 Miss. 17.



is negligence in an agent? We are assisted in at least two important ways: first, light is obtained by comparing cases arising out of bailment with those arising out of agency, now not usually brought together; secondly, a new test, easier of application, — What did he undertake to do? — is substituted for the old one, What was the degree of the defendant's negligence?

The proposition that I shall consider by this method is this: that the degree of care required of an undertaker is not proportionate to the reward, and therefore that the fact that the duty was undertaken gratuitously is immaterial, except as *evidence* of the extent of care undertaken. This, as I shall try to show, is the general result of the authorities, though there has been no explicit decision to that effect. And the proposition necessarily follows from the nature of an undertaking. No consideration is required, only entrance on the undertaking; and the compensation received is only one of a number of facts bearing on the question, What was the duty undertaken?

The leading case on the subject of gratuitous undertakings is *Coggs v. Bernard*,<sup>1</sup> in which the declaration alleged an undertaking to carry, but contained no allegation of a reward. The case was argued on a motion for arrest of judgment. The degree of care required of a gratuitous bailee was not in question, because the verdict was found on a count alleging that the defendant *assumpsisset . . . salvo et secure deponere*. The several opinions, however, show that the lack of consideration was not of itself regarded as affecting the degree of care. Gould, J., said that in case of a mere voluntary undertaking the defendant was liable only for gross neglect; but if he undertook expressly to do the act safely, he would be liable. "When a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he has the goods committed to his custody upon those terms. Holt, C. J., said in like manner, "There is no reason or justice, in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him." Of these *dicta* it may be said, first, that they allege the true reason for liability, namely, that he is to be held to such degree of care as he has undertaken

---

<sup>1</sup> 2 Ld. Raym. 909 (2 Ann.).

to give; secondly, though they conceive that the degree of care undertaken by a gratuitous bailee is *prima facie* only the slightest, yet in any case it may be shown that greater care was in fact undertaken. The rule, in short, was introduced with a view of helping the jury deal with a question of fact, namely, What was the degree of care undertaken; a worthy object, which seems not to have been attained.

Powell, J., in his careful and acute opinion, did not consider the degree of care to be bestowed; but it necessarily follows from his argument that the degree of care is not proportionate to the reward.

"It is objected that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action."

The opinion of Lord Holt has been followed in the modern treatises on bailments, and the cases constantly repeat his distinctions between gratuitous bailments, requiring ordinary or slight care, and bailments for hire.<sup>1</sup> The distinction has been severely criticised, as is well known; and it is doubtful if it is required to support the decision of many reported cases.

Nominally, however, the rule is established that a gratuitous bailee or other undertaker is liable only for gross negligence; and it has been the constant though unconscious effort of the courts so to apply this rule as to make it conform to the true principle of undertakings. And some subordinate rules have been adopted which go far toward reconciling the rule with true principle.

1. A gratuitous undertaker is bound to take only such care as

---

<sup>1</sup> Though in pleading, an allegation of negligence, simply, is enough: i. e., *gross negligence* is a matter of evidence.

he takes in his own affairs; "for the keeping them [goods bailed] as he keeps his own is an argument of his honesty."<sup>1</sup> "For although that [the care bestowed in his own case] may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest; and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns."<sup>2</sup> In this crude form the rule is objectionable, and is hardly law to-day. But there is a good test which is quite similar. The care taken by the defendant of his own goods in the particular event is no evidence at all of the care undertaken; but the care known to be taken by him of his own affairs prior to the undertaking is strong evidence of the care undertaken; for he would be expected to attend to the business of others no more carefully than to his own. In this form, the rule is unobjectionable, and would doubtless be followed; and it seems to be what was really in the mind of Lord Holt and of Chief Justice Parker in the opinions I have quoted.

2. Even a gratuitous undertaker is bound to use what skill he has.<sup>3</sup> Any negligence in an undertaker is gross, if from the nature of his business or from his special knowledge he knew that loss might ensue; for an undertaker must do the best he can. This carries Lord Holt's *dictum* so far that it coincides with the true rule in all the large class of cases covered by it. Thus in *Shiells v. Blackburne*,<sup>4</sup> where the defendant gratuitously undertook to enter goods in the Custom House for the plaintiff, but did it so negligently that they were lost, Lord Loughborough, C. J., said: —

"If in this case a ship-broker or a clerk in the Custom House had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries; but where an application, under the circumstances of the case, is made to a general merchant to make an entry at the Custom House, such a mistake as this is not to be imputed to him as gross negligence."

---

<sup>1</sup> Holt, C. J., in *Coggs v. Bernard*.

<sup>2</sup> Parker, C. J., in *Foster v. Essex Bank*, 17 Mass. 479, 499.

<sup>3</sup> *Wilson v. Brett*, 11 M. & W. 113.

<sup>4</sup> 1 H. Bl. 158.

3. One undertaking a hazardous affair must take all reasonable steps to secure its successful accomplishment; the omission of any such step is gross negligence. An example of such an undertaking is the carriage of passengers. In the leading case of this sort, *Philadelphia & Reading R. R. v. Derby*,<sup>1</sup> Grier, J., said: "A distinction has been taken, in some cases, between simple negligence and great or gross negligence; and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" This is only a *dictum* like (Lord Holt's original statement of the doctrine of "gross negligence"); but it seems to represent current judicial opinion. It would cover all cases where one undertakes to do an act that requires a skill he does not possess. If, for instance, A, being a blacksmith, finds and takes up B's watch and attempts to repair it, he would doubtless be held to answer for the damage.

4. Where the gratuitous undertaker does an act which is contrary to the undertaking, he acts at his peril, though he uses due care. In a case in Massachusetts, A delivered a bond to B to be kept for him gratuitously. After a year B sent the bond by mail to A's wife, and it was lost. The majority of the court held B liable, without regard to negligence. "The complaint against him is not that he kept it negligently, or lost it by gross carelessness, but that he intentionally disposed of it in a manner not authorized by the terms of the trust. For the purposes of this case, it is wholly immaterial whether the post-office furnishes a reasonably safe mode of transmission, in the case of valuable papers of such a description, or not. The question of due diligence or gross neglect, in our opinion, is not raised by the bill of exceptions. . . . He subjected the plaintiff to a risk which he had not con-

---

<sup>1</sup> 14 How. 468, 485. See *acc.* *Siegrist v. Arnot*, 10 Mo. App. 197.

templated, and did an act not authorized by the terms of his trust." <sup>1</sup>

These various rules seem to neutralize the effect of Lord Holt's *dictum*. Though the courts still say that a gratuitous undertaker is liable only for gross neglect, they really, by so doing, only postpone for a moment a decision as to the duty which was undertaken. For when called upon to interpret the term "gross neglect," they hold the gratuitous undertaker to be guilty of gross neglect if he falls below the standard of care and exertion required by his undertaking; thus finally applying the same test which is adopted in the case of undertakings for hire. The Supreme Court of Tennessee correctly states the present condition of the law as follows: "This general principle that a mandatory is only liable for gross neglect implies strict fidelity on his part, and the exercise of such care and prudence as, with reference to the particular subject of the bailment and the circumstances of the particular case, may be requisite for the performance of his undertaking." <sup>2</sup>

While thus showing that the degree of care required of a gratuitous undertaker does not differ from that required of an undertaker for hire, I have at the same time considered certain rules which are in use for determining the degree of care required in certain cases. This branch of the subject might be carried to great length, but enough has perhaps been said to indicate the method that might be adopted, and, I hope, to show the advantages of that method. In brief, the rule applicable in all cases of agency, bailment, or other undertaking, whether gratuitous or not, is this: The undertaker is held to such a degree of care and exertion in the business as in fact he undertook to bestow.

*Joseph H. Beale, Jr.*

---

<sup>1</sup> Ames, J., in *Jenkins v. Bacon*, 111 Mass. 373, 378. See to the same effect *Colyar v. Taylor*, 1 Cold. 372.

<sup>2</sup> McKinney, J., in *Colyar v. Taylor*, 1 Cold. 372, 379.

AN UNSETTLED POINT OF EVIDENCE.<sup>1</sup>

HOW FAR CAN A WITNESS-TO-VALUE DETAIL OTHERWISE INADMISSIBLE SALES AND APPRAISALS ON WHICH HE FOUNDS HIS OPINION?

IN the trial of cases involving the value of real property, witnesses who are personally acquainted with the subject, and who are capable of forming an opinion, are allowed to give in evidence their opinion of the property's value; and are generally allowed to go even farther, and give the grounds for their opinion.

It has been customary for counsel to take advantage of this license to introduce as evidence much irrelevant matter in aid of their case, which would be unhesitatingly ruled inadmissible if offered on any other plea.

No class of witnesses is more partisan in its testimony than these witnesses-to-value, since in establishing the side of the case they are called on, they also establish the accuracy of their own opinion; and, accordingly, it is usual for such a witness, in response to the request of counsel to "state the grounds on which he bases his opinion," to drag into the case all the sales, appraisals, tax valuations, or other facts, rumors, or fancies, that he believes will be useful to prop up his opinion, or that he has been told will be useful to his side of the case.

While the inferior courts have occasionally excluded such details, they have more often admitted them, and have thus allowed the admissibility of this sort of testimony to become more or less firmly established in practice, in total opposition to the common-law theory of evidence, and with the practical result of hopelessly confusing juries, who quite naturally assume that if the evidence is good enough to found the opinion of the witness on, it is good enough to found a verdict on.

Some examples that have lately come under my notice in the Superior Court of Massachusetts will serve to illustrate the point.

In one case the presiding judge ruled that a witness-to-value, in

<sup>1</sup> Since the above article was sent to us for publication, the point under discussion has been settled in Massachusetts in accordance with the view advocated by the article. See *Hunt v. Boston*, 152 Mass. 168. — Eds.

giving the grounds on which his opinion rested, could not give the details of sales of property, not sufficiently similar to the property in question, to be otherwise admissible in evidence. In another case another judge ruled just the other way, and allowed the witness to state all the details of such sales, even though he had no personal knowledge of the terms of some of them. In a case before county commissioners a witness was permitted to give the details of the appraisals of sundry pieces of property made by appraisers appointed by the Probate Court, and the valuations placed on sundry pieces of property by assessors.

The reasons generally urged for the admissibility of such details are that it is an "established rule of evidence that the witness may give the grounds for his opinions," or that "an expert may always give the details on which he founds his opinions." Both of which reasons are fallacious; since a rule of evidence can not be said to be established until it is declared to be law by the highest tribunals, however much it may be imbedded in the practice of the lower courts; and no court of final resort has decided that such details are admissible so far as I have been able to ascertain; while in one jurisdiction such evidence has been adjudged inadmissible.<sup>1</sup>

Again, witnesses-to-value are not allowed to testify to their opinions because they are experts, and have science or skill greater than the jurors, but because they have knowledge of the particular facts in the case which the jurors have not, and so by an exception to the general rule of evidence and of necessity they are not confined in their testimony to facts, but may also testify as to their opinions.<sup>2</sup>

While, however, there is a wide difference between an expert and a witness-to-value in the difference of the qualifications which make them able to give this exceptional sort of evidence, it is to be observed that the evidence given by either of them is practically the same; that is to say, they are each of them allowed to testify as to their opinion, and therefore if an expert be allowed to state irrelevant facts, as the grounds and reasons upon which his opinion is founded, reasoning from analogy it might seem that a witness-to-value might do the same.

---

<sup>1</sup> *Bollman v. Lucas*, 22 Neb. 796.

<sup>2</sup> *Shattuck v. Stoneham Br. Ry.*, 6 Allen, p. 115, *Chapman, J.*, p. 117; *Wyman v. Lexington & W. Camb. Rd.*, 3 Met. 316, p. 327; *Swan v. Middlesex*, 101 Mass. 177, *Gray. C. J.*

Chief Justice Shaw,<sup>1</sup> in deciding that an expert may state the grounds on which he founds his opinions, defines the extent of the doctrine quite clearly, as follows: "The ground on which an expert, a person of large experience in any particular department of art, business, or science, is permitted to testify to his opinion, is, that from his larger experience and more exact observation of facts, and the connection between certain appearances, and their causes or results, he is able to draw correct conclusions from circumstances, which a man of ordinary knowledge and experience could not do. The circumstances on which such an opinion may be founded are either facts of general notoriety, assumed to be known to all persons of skill and experience in the department to which they pertain, and which, when explained, may be comprehended and applied by any person of good understanding; or it may be founded on facts proved.

"Such general facts, assumed to be generally known without specific proof, because they are capable of being known and understood, without any such proof, to all inquirers, are vastly too numerous to define; but the point may be illustrated by saying they are such as the elements and forces of physical nature, the structure, capacities, and functions of the human and other animal bodies, the common powers, propensities, and passions of human nature, and the impelling and governing motives to human action. As these are capable of being comprehended, when explained, without specific proof, it appears to the court that the witness should be permitted to explain the grounds and reasons of his opinion to the court and jury; they may readily perceive the force of his reasoning, the soundness or fallacy of his logic, and therefore judge of his capacity to give an opinion on the subject, and the correctness of his conclusions, and consequently the weight due his opinion."

It was evident that in giving this decision Chief Justice Shaw never contemplated the possibility of a witness detailing facts which it would not be legitimate for the jury to consider as a ground for their verdict, and although other cases have been less definite in their language, the principle does not seem to have been extended by the decisions.

The analogy of expert testimony would therefore seem to show just the contrary of the claim that irrelevant details may be stated

---

<sup>1</sup> *Dixon et al. v. Fitchburg*, 13 Gray, 546, at p. 555.



by a witness-to-value as reasons for his opinion, and therefore if admissible at all they must be so on some peculiarity of their own.

In the case of *Sexton v. North Bridgewater*<sup>1</sup> the court, citing *Dickinson v. Fitchburg*, held a witness-to-value was rightly permitted to state the reasons of his opinion, saying that "the nature of those reasons affected only the weight of this testimony." The reason alleged by the witness was that the change in the highway gave a right of way which the plaintiff did not have before. But this case cannot be quoted as an authority for the admissibility of such evidence as appraisals and the details of irrelevant sales, since it only determines that the witness may mention a fact, that the jury was entitled to consider independently of its being a reason of the witness's opinion.

Possibly the language of the decision might be construed to allow a witness to mention as a reason for his opinion any fact however irrelevant, as, for instance, that he had heard of or knew of sales and appraisals of other estates in the vicinity, which would seem to be legitimate; but when he undertakes to go further and state the details of those sales or appraisals, then the evidence becomes objectionable.<sup>2</sup>

In the case of *Edmands v. Boston*<sup>3</sup> a witness was allowed to give the details of sale, since it was *in some sense a criterion* and therefore admissible. The implication from this decision would seem to exclude irrelevant sales.

There is no evidence in determining the value of land more satisfactory, but at the same time more misleading if not carefully guarded, than the sales of other similar estates under similar circumstances and at about the same time, and accordingly, when the court has determined that there is the resemblance to make them a criterion, they are admitted in most jurisdictions as evidence of value;<sup>4</sup> but the use made of this expedient is to introduce to the jury sales that are misleading, and appraisals by assessors or others which the court would not allow the jury to consider as evidence of value, and which if allowed would be sufficient ground for granting a new trial.<sup>5</sup>

---

<sup>1</sup> 116 Mass. 200.

<sup>2</sup> *Bollman v. Lucas*, 22 Neb. 796.

<sup>3</sup> 108 Mass. 535.

<sup>4</sup> *Presby v. Old Colony Rd.*, 103 Mass. 1, at p. 9.

<sup>5</sup> *Chandler v. Jamaica Pond Aqueduct*, 122 Mass. 305; *Gardner v. Brookline*, 127 Mass. 358, at p. 362.

The assumption that the witness may go on and give details because he may state as the ground of his opinion the fact that there were such sales is not justified by the usual rules of evidence, where the fact of an occurrence or existence of a thing being relevant is admitted in evidence, but the details of the occurrence or thing being irrelevant are excluded. As for instance the fact of a conversation<sup>1</sup> having taken place, or a letter having been received, may be admissible,<sup>2</sup> while what was said in the conversation or the contents of the letter may be inadmissible.

It would seem reasonable that the party cross-examining a witness should be allowed to elicit all the details of any sales mentioned by the witness as a reason in the examination-in-chief, but even cross-examination should stop there, and should not go so far as to inquire of the witness whether he had considered other irrelevant sales in making up his mind, and then proceed to elicit the details of those sales, as is often done on the double plea that "it is cross-examination" and "the witness says he considered these sales in making up his mind."

But such inquiry does not fall within the legitimate scope of cross-examination, as the law is very aptly stated by Mr. Justice Knowlton in giving the decision of the court in *Sullivan v. O'Leary*.<sup>3</sup> "The discretion exercised in regard to cross-examination should not ordinarily go so far as to permit the introduction of evidence which has no legitimate relation to any of the issues on trial, and which is, at the same time, of such a character as to be likely to be applied to them by the jury, and improperly affect the verdict."

In addition to the objection that irrelevant details, for whatever purpose introduced, would scarcely fail to be considered more or less for every purpose, there is the further objection that such details, even though elicited on cross-examination, are objectionable, since they injuriously multiply the issues to be tried; for each of these sales or appraisals is subject to explanation,<sup>4</sup> and all the circumstances surrounding them may be proved. And therefore on this ground alone, since they are immaterial to the direct issue,

---

<sup>1</sup> *McBride v. Cicotte*, 4 Mich. 478; *Pierce v. Gibson*, 9 Vt. 216.

<sup>2</sup> *Mayo v. Mayo*, 119 Mass. 290.

<sup>3</sup> 146 Mass. 322. See also *Thompson v. Boston*, 148 Mass. 387; *Crowell v. Porter*, 106 Mass. 80.

<sup>4</sup> *Ham v. Salem*, 100 Mass. 350.

the court should not allow them to be brought into the case, to hopelessly confuse and lengthen the trial.<sup>1</sup>

In any aspect of the case it would be sound law and reason to confine an expert or witness-to-value in giving the grounds of his opinion to the details of such transactions as are otherwise relevant to the issue.

*Augustus P. Loring.*

---

<sup>1</sup> *Lincoln v. Taunton Copper Company*, 9 Allen, 181; *Crowell v. Porter*, 106 Mass. 80.

# HARVARD LAW REVIEW.

---

Published monthly, during the Academic Year, by Harvard Law Students.

---

SUBSCRIPTION PRICE, \$2.50 PER ANNUM . . . . . 35 CENTS PER NUMBER.

---

## *Editorial Board.*

OLIVER PRESCOTT, JR., . . . . .	<i>Editor-in-Chief.</i>
PHILIP S. ABBOT, <i>Treasurer.</i>	RICHMOND O. AULICK,
ALBERT S. BARD,	ALBERT E. HADLOCK,
NORMAN HAPGOOD,	HENRY HUDSON,
CARLETON HUNNEMAN,	J. WRIGHT HUNT,
FREDERICK B. JACOBS,	M. DAY KIMBALL,
JAMES G. KING,	JAMES M. NEWELL,
PHILIP WARDNER,	CHARLES WARREN,

GEORGE E. WRIGHT.

---

HARVARD LAW SCHOOL — INCREASED NUMBER OF STUDENTS. — The astonishing increase in the membership of the Law School this year must be very gratifying, not only to the instructors as evidence of appreciation of their work, but to all who are interested in the school and its methods. The Dean especially must take great satisfaction in the prosperity of the school, and in the assured success and firm establishment of the method of instruction to which he has given so much thought and so many years of devoted effort. To be sure, it is not possible to say that the growing confidence in the Langdell method has been the sole cause of the increase of students in the present year: with our great increase we may readily admit that a portion of the growth is due entirely to accidental causes. Yet such increased confidence, warranted as it is by the success of recent graduates of the school, and spread through the profession, as we are glad to acknowledge, by the influence of the Harvard Law School Association, is believed to be the chief cause of the present numbers.

In view of the increase of this year, a few statistics and comparisons may not be uninteresting: —

While last year there were 160 new entries to the school during the entire year, this year, up to November 25, there have already been 205. Of this number, 57 are Harvard graduates, 73 are graduates of other colleges, and 75 are non-graduates. Not before since 1873, with possibly one exception, have the graduates of other colleges exceeded those of Harvard. This increase of graduates of other colleges is worthy of study. To the First Year class at this time last year Yale and Brown had together contributed 8 of their graduates, and Bowdoin none; to the First Year class of this year, those three colleges have given 34 men, Yale 18, and Brown and Bowdoin 8 each.

Of the 363 men now in the school, as against 279 at the same time last year, it is somewhat curious that the number of Special Students remains the same as last year, 61. The entire increase, therefore, appears in the regular classes. With regard to these Special Students, too, from the fact that 6 already hold the degree of LL. B. and 3 others are college graduates, it would seem pretty evident that many

are registered as they are for far other reasons than that of inability to pass the examinations necessary for entrance to the regular classes.

One other fact especially worthy of notice is that the present Second Year class is now larger than it was in its first year, numbering 112 this year as against 101 last year. This is something which has never happened before, at least since the present system of examinations began, and in itself alone is something rather remarkable. The natural tendency, of course, is that a class in the Law School, like a class in college, should steadily diminish in numbers from its first to its last year. But in this instance it is gratifying to see that the number of men who fell out at the end of the first year was so small that it could, even without reckoning the few who for various reasons had failed to receive promotion to the present Third Year class, be more than replaced by the number entering to advanced standing.

The following list shows the number of students as they appeared in the Catalogue of 1890-91, and as they will appear in that of 1891-92:—

1890-91.		1891-92.	
Third Year . . . . .	44	Third Year . . . . .	48
Second Year . . . . .	73	Second Year . . . . .	112
First Year . . . . .	101	First Year . . . . .	142
Special Students . . . . .	61	Special Students . . . . .	61
<hr/>		<hr/>	
Total . . . . .	279	Total . . . . .	363

JUDICIAL GRAMMAR.—The REVIEW is indebted to the Chief Justice of Montana, Hon. Henry N. Blake, for an exhaustive research (the substance of which is given below) into the usages of the bench, both in this country and in England, in regard to the use of number (*i. e.*, whether singular or plural) in terms which are necessarily employed with great frequency in instructions or opinions. The subject is one, as the Chief Justice remarks, of form rather than substance, the use of incorrect grammar not being material from a legal point of view. Sir Edward Coke, in the preface to his Commentaries upon Littleton, says: "In school divinity, and amongst the glossographers and interpreters of the civil and canon laws, in logick, and in the liberal sciences, you shall meet with a whole army of words, which cannot defend themselves *in bello grammaticali*, in the grammatical war . . ." It is probably to meet the confusion arising *ex bello grammaticali* that the canon of interpretation was established, that statutory expressions in the singular number shall be deemed to include the plural, and *vice versa*. The question is, shall we say, "the majority of the court are," or "the majority is," "the court are," or "the court is," "the jury are," or "the jury is," etc., etc.? The Chief Justice finds a great diversity among the members of the bench in the use of these terms. After citing a very large number of authorities, he comes to the conclusion that the highest number of jurists has sanctioned the use of the expressions "the majority are," "the court is," "the jury are." Why the distinction should be made between the jury and the court, except in the case of a single judge, it is difficult to imagine. It probably arises from the fact that the court, though really composed of several individuals, is (or are) vulgarly looked upon as an awful entity; whereas it is always difficult to remember that the jury are not "twelve men good

and true." Then again, in this country at least, the opinion of the whole court is, as a rule, written by one of its members, whereas the jurors are required to state their conclusions *seriatim*. Whatever be the explanation, the usage is as Chief Justice Blake has found it, and though not a subject of great weight as a matter of law, it is still interesting as a legal curio.

THE TILDEN WILL CASE.—The final decision of the famous Tilden will case in the New York Court of Appeals is suggestive, not only as an addition to the list of bad wills of well-known lawyers, but also as emphasizing one of the weaknesses of the New York law. Mr. Tilden left the bulk of his property to his executors, in trust to turn it over to the Tilden Trust, an institution to be incorporated for the purpose of building a free library, and for such other educational and scientific purposes as they thought best. The amount to be given to the Tilden Trust was in the discretion of the executors, and the giving of any depended on their approval of the corporation when formed.

The court refuses to find a trust, for lack of a certain beneficiary. It is not denied that a valid bequest may be made to a corporation to be created after the death of the testator; but the rights of the corporation must begin at once on its creation; it is the discretion in the executors here that invalidates the trust. New York knows nothing of the *cy-près* doctrine, which elsewhere upholds charitable bequests when no beneficiary is named.

Three kindly judges out of seven manage to dissent on the ground that the section giving to the executors power to give to general purposes, should they fail to approve the Tilden Trust, is void, and that therefore the former section stands as a valid trust. This ground of construction does not, of course, touch the general question of law.

Besides the obvious slur the facts of this case throw on the general policy of discarding the *cy-près* doctrine, they give an opportunity to deplore the fact that what might be called the *laissez-faire* doctrine is not more widely applied in cases of attempted trusts. The property is given to the executors. The equitable rights of the next of kin, like all constructive trusts, rest purely on ideas of natural justice, and it certainly seems as though the interference of equity to set aside the legal title is uncalled for, except when the failure of the testator's object gives the next of kin a right in justice to complain. When the donees, as in this case, are willing to fulfil the testator's wishes, it seems as though equity, in interfering to prevent their action, is converting a regulating principle which depends for its life solely on natural justice into a positive rule having no defence either in policy or in principle. Such, however, seems to be the general law.

JUSTIFIABLE HOMICIDE—KILLING A THIEF.—The defendant in a recent Texas case hired a seeming tramp, so his own testimony runs, to help him gather a crop. The conversation and conduct of the new acquisition soon suggested to the master the probability that his servant was a horse-thief; whereupon he determined, on the night of the expected transaction, to keep watch with a double-action pistol.

An hour after the watch began a man appeared, leading one of the defendant's mares from the pasture. When the defendant shouted to the thief to "hold up," the latter slipped the halter from the animal's

neck, and, according to the defendant's testimony, advanced toward him. The defendant fired five times, and the thief died soon after.

The jury, instructed to find the prisoner guilty if they believed the theft was committed and the thief was fleeing from the place, brought in a verdict of murder in the second degree.

An appeal was then brought, and it turns out that under the Texas idea of justifiable homicide the verdict cannot stand. The court below erred in refusing an instruction, asked by the defendant, that if the deceased were within gunshot of the place where he had stolen, the shooting was justifiable, no matter how completely he had abandoned the property or how desperately he was attempting to flee. The code expressly puts among the exceptions to the rule that the killing must take place before the offence has been committed, the following: "In case of burglary and theft by night the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building."

Perhaps an adequate criticism of this remarkable way of discouraging theft is suggested in the court's quiet remark that "This statute of ours, in so far as this and other enumerated exceptions are concerned, is an invasion upon the rule of the common law, and is, so far as we know, *sui generis*."

## THE LAW SCHOOL.

### LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They represent, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

REPUDIATION OF CONTRACTS. — (*From Professor Williston's Lectures.*) — The point at issue is this: Suppose a contract between A and B by which B contracts to sell land to A on December 1; if A before that time erects a house on it, which A contracts to do, now in case B on November 1 notifies A that he will not carry out his contract, what are A's rights? Is he entitled to sue B *immediately*, alleging as a breach the failure of B to perform?

It would seem that B was not bound to perform his promise to convey the land until after he had received performance of the condition precedent.

Two views are open: (1) The first, which has the weight of authority on its side, is that the notice operates as a repudiation of the contract, and that A may treat this as a breach of contract just as if B had failed to perform, and may sue for this breach; (2) The second view treats the case as analogous to prevention by B of performance of a condition precedent, and the breach should be laid on the implied covenant by B to receive A's performance or not to prevent it.

Now when B on November 1 announces that he will not perform his promise on December 1, what constitutes the breach of contract? The announcement alone is not the essential thing. B has a perfect right to say whatever he likes, provided he is ready to perform on the appointed day. But a change in the situation comes if A *acts* on the refusal; that is, as soon as B has really prevented A's performing his

condition precedent. The prevention is the essential point. Until A has by taking action (which may consist either in doing what he would not otherwise have done, or in refraining from doing what he would have done) changed his position upon B's notice to him, there is no reason why the contract should be treated as broken merely by B's words alone. A should have no cause of action. The moment, however, that A takes such action and thus renders it impossible, inconvenient, or nugatory to perform his condition, at that time B has really prevented him from performing it. And B having made A's performance impossible by his own act, cannot take advantage of its non-performance.

We may show clearly that A has really been prevented by looking at the law of damages. It is a rule of that branch of the law that a party cannot enhance damages by his own act, and hence that after notice by the defendant that he rejects the contract, the plaintiff *cannot* go on and perform, or at least that if he does so he will not be permitted to recover damages. *Clark v. Marsiglia*, 1 Denio, 317; *Dillon v. Anderson*, 43 N. Y. 232; *Black v. Woodrow*, 39 Md. 217; *Heaver v. Lanahan* [Md.], 22 Atl. Rep. 263; *Collins v. Delaporte*, 115 Mass. 159; *Danforth v. Walker*, 37 Vt. 240, 40 Vt. 387; *Cameron v. White*, 74 Wisc. 425. If this is a strict rule, then it is true that notice of rejection by B is a literal prevention of performance.

This is the law to be laid down in cases of contracts for sale of land on an appointed day. If B sells off the land before that day, or otherwise makes it apparently impossible for himself to be able to perform as agreed, still A cannot sue for breach, or refuse to buy, if *at* the time appointed B is ready to sell, *unless* A has acted in some way during the meantime on the faith of B's apparent repudiation. Cf. *James v. Burchell*, 82 N. Y. 108.

Assuming, then, that A assigns in his declaration a breach of an implied agreement by B not to prevent and to accept performance under the contract, it remains to be considered at what time he may bring action. It must be seen that if B has repudiated and A acted on that, the rights of the parties are fixed at that time, and no later retraction by B can alter A's right to sue. It is also evident that A's cause of action against B does not arise until some performance under the contract by B is due and has not been performed. *Daniels v. Newton*, 114 Mass. 530, *contra* to the English law as expressed on *Hochster v. Delatour*, also in 14 N. E. Rep. 436 and 8 So. Rep. 450. It seems that such failure to perform may consist either in not receiving and accepting plaintiff A's performance, or in a failure by the defendant B to keep his principal promise. Hence A would have no right to bring action until December 1.

The cases of marriage where B promised to marry A on December 1, and marries C on November 1 (42 N. Y. 246, *Short v. Stone*, Langd. Cases Con.), may perhaps be differentiated on this ground, that the mutual promises to marry imply further promises that in the meantime the parties will occupy the relation of betrothed to one another, and B's marriage on November 1 constitutes a breach of the latter promise. Unless these cases can be explained in this way, they must be regarded as pure exceptions to what seems the true rule, that a plaintiff must wait until the time for defendant's performance comes before he can bring suit for breach of defendant's contract.



## RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the court. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

**ADMIRALTY — JURISDICTION.** — A contract with the owners to supply their vessels, for the period of a year, with all the provisions they might require, while in the port where the supplies are to be furnished, is not a maritime contract, and a court of admiralty has no jurisdiction of a suit for damages for its breach by the ship-owners. *Diefenthal v. Hamburg-American Co.*, 46 Fed. Rep. 397.

**AGENCY — FELLOW-SERVANT — COMMON MASTER.** — In an action against the defendant to recover for an injury caused by the negligence of his servant, it is no defence that the plaintiff was employed in a common employment with that of the negligent servant, unless the servants had a common master also. The facts were that the plaintiff and the negligent servant were both engaged in work upon a house, but had different masters who were independent contractors. *Johnson v. Lindsay & Co.*, [1891] A. C. 371.

The English law upon this point has heretofore been somewhat doubtful, owing to the language of Lord Cairns in *Wilson v. Merry* (L. R. 1 H. L. 326, 331, 332), and to the case of *Wiggelt v. Fox* (11 Ex. 832). The court disapprove the recent Scotch decision of *Woodhead v. Gartness Mineral Company* (4 Sc. Sess. Cas. 4th Series, 469).

**AGENCY — MASTER AND SERVANT — RATIFICATION OF TORT.** — Coal ordered by plaintiff from defendant was delivered at plaintiff's house by a third person not in defendant's employ, acting without defendant's knowledge. While unloading the coal the volunteer negligently broke a plate-glass window. Afterwards, with knowledge of the accident, defendant demanded from plaintiff payment for the coal. *Held*, in an action for breaking the window, that by ratifying the delivery of the coal, defendant became responsible for the tort of the volunteer. *Dempsey v. Chambers*, 28 N. E. Rep. 279 (Mass.).

**AGENCY — RATIFICATION — WHEN IMPLIED.** — The plaintiff intrusted a certain deed to his agent, the defendant. The defendant made an unauthorized disposition of the deed. The question raised was whether the plaintiff by his acquiescence had ratified the defendant's unauthorized act, and so relieved him from liability. *Held*, that he had not ratified, that "mere passive inaction or silence, which would amount to an implied ratification in favor of third parties, might not amount to that in favor of the agent." *Triggs v. Jones*, 48 N. W. Rep. 1112 (Minn.).

**AGENCY — VOLENTI NON FIT INJURIA.** — The fact that a person with full knowledge of the risk voluntarily continues without remonstrance in a dangerous employment does not preclude his recovery for an injury caused by defective machinery, although the defects may have been an element of danger which he contemplated. Whether in such circumstances he voluntarily assumed the risk is a question of fact for the jury. *Smith v. Baker & Sons*, [1891] A. C. 325.

This case effectually disables the Latin maxim which was brought upon the field with much parade in *Thomas v. Quartermaine* (18 Q. B. D. 685). To be sure, only one of the lords expressly disapproves the decision of that case. But each of the majority opinions discusses the maxim *volenti non fit injuria* in a way which shows that the formula in question has little value in determining cases of the class of *Thomas v. Quartermaine*.

**CARRIERS — RAILROAD — REFUSAL TO ACCEPT TICKET.** — It is the duty of a passenger, if he has not the required ticket or token evidencing his right to travel on that train, to pay his fare or quietly leave the train when requested, and resort to the appropriate remedy for the damages he has sustained. Here he had not had his ticket properly stamped, he was ejected, and the court *held* that he could not recover for the expulsion. *Peabody v. Oregon Ry. & Nav. Co.*, 26 Pac. Rep. 1053 (Ore.).

**CARRIERS—RAILROAD—REFUSAL TO ACCEPT TICKET.**—Where the conductor of a railroad train returns to a passenger the wrong portion of a return-trip ticket, and another conductor on the return trip refuses to accept it after the mistake is explained to him, and ejects the passenger from the train, the railroad company is liable. *Kansas City, M. & B. R. Co. v. Riley*, 9 So. Rep. 443 (Miss.).

**CONTRACT—CONSTRUCTION—AGENCY—OSTENSIBLE AUTHORITY.**—The directors of a corporation appointed a committee to procure plans for the erection of a building, subject to their approval. The committee orally agreed with the builders that the contract should be awarded to the lowest bidder. A notice to bidders was then sent to the builders, which, besides setting forth the specifications, contained a clause stating that the committee reserved the right to reject all bids. The directors knew the above facts, but made no effort to inform the builders that the committee had no authority to award the contract absolutely. The plaintiff's bid was the lowest, and he sues the corporation for breach of contract. *Held*, that the offer was that at first made by the committee, and not that modified by the clause in the notice to bidders, and that the corporation was bound by the terms of the contract, on the doctrine of ostensible authority. *McNeil v. Boston Chamber of Commerce*, 28 N. E. Rep. 245 (Mass.).

**CONTRACT—DEFENCE THAT OBJECT ILLEGAL.**—A telegraph company received a message for transmission and accepted payment. In an action for statutory penalty incurred for non-delivery, the company cannot defend on the ground that the telegram related to an illegal transaction. *Gray v. West. Union Tel. Co.*, 13 S. E. Rep. 562 (Ga.).

**CONTRACTS—PARTY WALL—DATE OF LIABILITY FOR CONTRIBUTIONS.**—A built a party wall on the boundary line between his land and that of B, under an agreement by which B engaged to pay one-half of the cost of building the wall whenever he should use it. B sold his premises and his right to use the wall to C. *Held*, that the sale of the right to use the wall was in itself a use of it, and that B became liable on the contract at once. *Nalle v. Paghi*, 16 S. W. Rep. 932 (Tex.).

**CONSTITUTIONAL LAW—ADMISSION OF WOMEN TO THE BAR.**—Attorneys at law are not civil officers within article 7, paragraph 6, of the Constitution of Colorado, which provides that "no person except a qualified elector shall be elected or appointed to any civil office in the State." Therefore, in the absence of any statutory or constitutional inhibition, women will be admitted to the bar on equal terms with men. *In re Thomas*, 27 Pac. Rep. 707 (Col.).

**CONSTITUTIONAL LAW—EMINENT DOMAIN—CONFLICTING USES.**—A strip of land for a necessary town way can be taken from a school-house lot by county commissioners, when the use of the lot for school purposes, although considerably impeded, will not be entirely prevented. *Easthampton v. County Commissioners of Hampshire*, 28 N. E. Rep. 298 (Mass.).

**CONSTITUTIONAL LAW—EMINENT DOMAIN—PRIVATE CORPORATIONS.**—An act authorizing incorporated rural cemetery companies to take property on condemnation proceedings, to enlarge their cemeteries, is unconstitutional, in that it authorizes private corporations to exercise the power of eminent domain for private purposes. *Board of Health of Township of Portage v. Van Hoesen*, 49 N. W. Rep. 894 (Mich.).

**CONSTITUTIONAL LAW—INTERSTATE COMMERCE.**—A law which requires every person, a citizen of the United States, doing business within a State, to pay a license-tax is unconstitutional as to citizens of other States. *In re Spain et al.*, 47 Fed. Rep. 208.

**CONSTITUTIONAL LAW—INTERSTATE COMMERCE—IMPAIRMENT OF OBLIGATION.**—Where a contract between an individual and a common carrier secured to the former peculiarly favorable freight-rates; *Held*, that such an agreement was without effect at common law, a common carrier being bound to serve all alike; and therefore the clause of the Interstate Commerce Act prohibiting such agreements is not unconstitutional, as it did not occasion any impairment of obligation, though the contract was in operation at the time the act went into effect. *Fitzgerald v. Grand Trunk R. R. Co.*, 22 Atl. Rep. (Vt.) 76.

**CONSTITUTIONAL LAW—TAXATION—INTERSTATE COMMERCE.**—Since a State has the right to tax personal property within its jurisdiction even though it is

employed in interstate commerce, a State tax on such proportion of the whole capital stock of a foreign sleeping-car company as the number of miles over which its cars are operated within the State bears to the whole number of miles over which its cars are operated, is valid and constitutional, though such cars run into, through, and out of the State. Affirming 107 Pa. St. 156. Bradley, Field, and Harlan, JJ., dissenting. *Pullman Palace-Car Co. v. Commonwealth of Pennsylvania*, 11 Sup. Ct. Rep. 876.

**EQUITY — INJUNCTION — ATTEMPT TO ANTICIPATE.** — When, upon receiving notice of motion for an injunction to restrain him from building, the defendant immediately puts on a gang of extra men and builds forty feet before receiving notice that an *ex parte interim* injunction has been granted; *Held*, that upon the motion coming on the court will immediately enjoin the defendant from allowing the wall to remain without awaiting the result of the trial. *Daniel v. Ferguson*, [1891] 2 Ch. 27.

**EQUITY — LIABILITY OF A MORTGAGEE IN POSSESSION.** — When it appears that the mortgagee has been in possession, and he is called upon to account for the rents and profits, and he fails to do so, his mortgage will be declared satisfied. *Morgan v. Morgan*, 22 Atl. Rep. 545 (N. J.).

**EQUITY — PROCEDURE — ABATEMENT — NEXT FRIEND — ATTAINING AGE.** — A suit by minors by their next friend is not abated by the death of the next friend, nor by the attainment of their majority by the minors after suit brought. *Tucker v. Wilson*, 9 So. Rep. 898 (Miss.).

**EQUITY — SPECIFIC PERFORMANCE OF CONTRACT.** — The defendant was employed by the plaintiff as manager, and had contracted to give his whole time to the plaintiff's business. The plaintiff sought in this suit to have the defendant enjoined from entering into any business or forming any contract with a rival company which would prevent him from giving the whole of his time to the plaintiff. Injunction refused because there was no express negative promise, and the case distinguished from *Lumley v. Wagner* on this ground. It is a mistake to suppose that because a man has contracted to do a particular thing, he has impliedly agreed not to do any act inconsistent with the doing of the thing which he has promised to do. *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416.

**EVIDENCE — CONFESSIONS — EXCLAMATIONS MADE IN SLEEP.** — The prisoner was heard to make certain exclamations relative to the crime with which she was charged. They were made in the night, and the witness could not say whether she was asleep or not. *Held*, such evidence is admissible, and the jury must give it the weight they think it deserves. *State v. Morgan*, 13 S. E. Rep. 385 (W. Va.). *Contra*, 19 Cal. 40.

**EVIDENCE — DEED ABSOLUTE IN FORM.** — A conveyance absolute on its face, and not intended as a mortgage, cannot be shown to have been intended as a conditional sale, or a sale with a right to redeem. *Peagler v. Stabler*, 9 So. Rep. 157 (Ala.).

**INTERNATIONAL LAW — RIGHT OF ALIEN.** — An alien has no right to land upon British soil, and therefore has no cause of action against one who prevents him from landing. *Musgrove v. Chun Teong Toy*, [1891] A. C. 272.

**MORTGAGES — MORTGAGEE'S RIGHT TO POSSESSION.** — A chattel mortgage authorizing the mortgagee to take possession of the property whenever he deems himself insecure gives the mortgagee an absolute discretion in the matter, and his right to take possession does not depend on the fact that he has reasonable grounds to deem himself insecure. *Cline v. Libby*, 49 N. W. Rep. 832 (Wis.).

**MORTGAGES — MORTGAGEE'S RIGHT TO POSSESSION.** — A clause in a chattel mortgage providing that the mortgagee may, at any time he feels insecure, treat the debt as due, and take and sell the property, will not authorize the seizure and sale of the property unless the mortgagor is about to do, or has done, some act which tends to impair the security. *J. I. Case Plow Works v. Marr*, 49 N. W. Rep. 1119 (Neb.).

**NEGLIGENCE — DUTY TO TRESPASSER — IMPLIED INVITATION.** — In an action for negligence, it appeared that plaintiff, an infant, was injured while playing on a turn-table belonging to defendant company, situated six hundred feet from the highway. *Held*, that it was not error to direct a verdict for defendant; the latter was under no duty, as towards a trespasser, to refrain from ordinary negligence in the management of its apparatus; and the fact that the turn-table would naturally attract

children did not make defendant liable as upon an implied invitation or license to enter. *R. R. Co. v. Stout*, 17 Wall. 657, disapproved. *Daniels v. N. Y. & N. E. R. R. Co.*, 28 N. E. Rep. 283 (Mass.).

**NEGLIGENCE — DUTY TO TRESPASSER — IMPLIED INVITATION.** — A railroad company is liable for injuries received by a child while playing upon a turn-table upon its premises near a public street, the turn-table not being protected by any inclosure nor guarded by its employees, though it was provided with the customary fastenings to keep it from revolving. *Barrett v. Southern Pac. Co.*, 27 Pac. Rep. 666 (Cal.).

**PARTNERSHIP — FOREIGN FIRM — SERVICE OF PROCESS.** — The plaintiff, an English firm, entered into a contract with the defendant, a foreign partnership. The contract was made in England. The writ was issued against the partnership, and was served in England on a member of it. *Held* (in the Court of Appeal, reversing the decision in the Queen's Bench Division), that the writ should be set aside because it was irregular. The rules of practice, allowing actions against a firm, in the firm name, are not intended to vary the rights of the parties. A plaintiff who sues partners in their firm name in truth sues them individually. This writ is of no avail against the partners resident abroad, and it is of no avail against the one in England, since it is taken out in such a form that judgment would have to be rendered against the assets of the firm and therefore of the partners who are without the jurisdiction of the court. *Heinemann & Co. v. Hale & Co.*, [1891] 2 Q. B. 83 (Eng.).

**REAL PROPERTY — CONVEYANCE BY WIFE — INTIMIDATION BY HUSBAND.** — In the absence of any fraud or inadequacy of price or notice on the part of a grantee, he cannot be held responsible for the conduct of the husband of the grantor in intimidating her to execute the deed. *Fightmaster v. Levi*, 17 S. W. Rep. 195 (Ky.).

**REAL PROPERTY — DEEDS — DELIVERY.** — Filing a deed for recording is a presumptive delivery. Such presumption, however, may be rebutted by proof that the grantor did not thereby intend to pass title as of the date of the deed. *Glaze v. Three Rivers Farmers' Mut. Fire Ins. Co.*, 49 N. W. Rep. 594 (Mich.).

**REAL PROPERTY — DOWER.** — H., during her husband's lifetime, joined with him in executing a mortgage on a certain piece of land. After his death, this piece of land was assigned her for dower, together with certain scrip and bonds which deceased had pledged. *Held*, in action by H. against her husband's administrator, that the court would not direct the latter, out of the personal property left in his hands, to redeem from their incumbrances either the land or the bonds and scrip above mentioned. *Hewitt v. Cox*, 15 S. W. Rep. 1026 (Ark.).

By this decision the Arkansas court adopts the rule which is supported, on the whole, by the weight of American authority.

**REAL PROPERTY — HIGHWAYS — DEDICATION — ACCEPTANCE BY USER.** — A road which has been opened to public travel by the land-owners, and worked and used for that purpose for more than ten years with their acquiescence, must be regarded as a highway established by dedication. *Gerberung v. Wunnenberg*, 49 N. W. Rep. 861 (Ia.).

**REAL PROPERTY — HIGHWAYS.** — Where a public highway extended across a tract of land and terminated at tide-water, and the State subsequently conveyed its rights below high-water mark to a corporation which artificially reclaimed the land; *Held*, that the right of way did not thereafter extend to the new tide-water mark over the land so artificially reclaimed. *Cent. R. R. Co. of New Jersey v. City of Elizabeth*, 22 Atl. Rep. (N. J.) 47.

**REAL PROPERTY — PRESCRIPTION — DISSOLUTION OF SALE.** — The action to dissolve a sale for non-payment of the price is prescribed by ten years. Such prescription is suspended during minority of heirs. The prescription running against a father at the time of his death is added to the time which has run since the heir has become of age. *Smith v. Escoubas*, 9 So. Rep. 907 (La.).

**STARE DECISIS — MARRIED WOMEN — MORTGAGE OF SEPARATE ESTATE.** — Where at the time a married woman mortgaged certain property she had the power so to do under the decisions of the Supreme Court, the rights of the mortgagee are not affected by the subsequent overruling of such decisions. *Farrior v. New England Mortgage Security Co.*, 9 So. Rep. 532 (Ala.).

**STATUTE OF FRAUDS—AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR.**—An oral agreement upon sufficient consideration by an agent of the payee of a note, to extend the time of payment for more than a year, is not within the Statute of Frauds, where the payor executed his part of the agreement by the payment of the consideration. *Grace v. Lynch*, 49 N. W. Rep. 751 (Wis.).

**STATUTE OF FRAUDS—ASSUMPTION OF DEBT OF THIRD PERSON.**—A purchaser who accepts a conveyance of real property, reciting that there is a mortgage lien thereon, which the purchaser assumes to pay, cannot avoid the payment of such lien by a claim that it was an oral promise to pay the debt of another, and so void by the Statute of Frauds. *Neiswanger v. McClellan*, 26 Pac. Rep. 18 (Kan.).

**STATUTES—MECHANICS' LIEN—MATERIALS.**—Lumber sold to a sub-contractor on a railway, for the erection of shanties for his employees and stables for his teams, is not within the statute giving a lien for labor performed or materials furnished in the construction, repair, and equipment of the railroad, and gives no right of action against the railway company. *Stewart Chute Lumber Co. v. Missouri Pac. Ry. Co.*, 49 N. W. Rep. 769 (Neb.).

**TRUSTS—LIMITATIONS OF ACTIONS.**—The use by a guardian of his ward's money, after the latter has reached his majority, in purchasing land in his own name, is an appropriation of the money to his own use, and a repudiation of the ward's right as *cestui que trust*, whereon a cause of action at once arises, against which the Statute of Limitations begins to run. *Potter v. Douglas*, 48 N. W. Rep. 1004 (Ia.).

**TRUSTS—PAROL AGREEMENT—STATUTE OF FRAUDS.**—Where A conveys land to B pursuant to an oral agreement that B shall sell the same and pay the proceeds to A, a parol trust only attaches to the money received if the land is sold, and, if confirmed by B after the sale, may be enforced at law. But the right to enforce the agreement dies with B, and the lands so held descend to his heirs unincumbered by any trust, as such parol agreement is void under the Statute of Frauds. *Collar v. Collar*, 49 N. W. Rep. 551 (Mich.).

**TRUSTS—POLICY FOR BENEFIT OF WIFE—MURDER OF INSURED BY WIFE.**—Where a man insures his life for benefit of wife by virtue of the Married Woman's Act, a trust is thereby created in favor of the wife. If, therefore, the wife murders the insured, his executors cannot maintain an action on the policy against the insurers, such an action being for the benefit of the wife, and it being contrary to public policy that she should profit by her crime. The question whether or not she knew of the existence of the policy before she committed the murder is immaterial. *Cleaver v. Mutual Reserve Fund Life Association*, 39 Weekly Reporter 638.

**USURY—PAYMENT—ACTION TO RECOVER.**—Where a debtor has paid a note tainted with usury, he cannot maintain an action to recover back the usurious interest. *Blain v. Willson*, 49 N. W. Rep. 224 (Neb.).

**WILL—CHARITABLE GIFT—LAPSE—CY-PRES.**—A charitable bequest to an institution which comes to an end after the death of the testator, but before the legacy is paid, does not fail for the benefit of the residuary legatee. The property falls to the Crown, which will apply it for some analogous purpose of charity. *In re Stevin*, [1891] 2 Ch. 236.

## REVIEW.

---

**NEGLIGENCE OF IMPOSED DUTIES.** By Charles A. Ray, LL.D.  
Rochester, N. Y. : Lawyers' Coöperative Publishing Co., 1891. pp. 757.

The author nowhere defines "imposed duties." The subjects treated of are the duties imposed by the law on a person in respect to his use or ownership of property, *e.g.* the rights and duties of the public and of individuals in regard to highways; the whole subject of easements; the natural rights to lateral support of soil, to air, light, and water; and the duty of using things in their nature dangerous in such a way as not to injure others. The subject-matter would be more accurately described by the title "Imposed Duties" than by the one the author has chosen, since it is really a general treatise on that subject.

The chief value of the book will be found in a very large collection of authorities and the accurate statement of modern decisions. These are, however, too often stated one after the other without proper discrimination or sufficient discussions of principle. It is like too many of our treatises in that more space is given to a digest of the cases than to an examination of principles. This is not true of the whole book. Many chapters contain clear and comprehensive statements of the law on the subjects to which they are devoted, and will doubtless be found of much value.

---

## LEADING ARTICLES IN EXCHANGES.

---

**Ohio Law Journal.** Vol. XXVI.

No. 20. Unanimity in Juries.

**Central Law Journal.** Vol. 33.

No. 19. Power of Court to Amend the Verdict and Judgment.

No. 20. In Slander Suits is Evidence of Current Report or Belief in Truth of Words admissible?

No. 21. The Tilden Will Case. Bigamy.

**Scottish Law Review.** Vol. 7.

No. 83. Trust Deeds by Insolvents. Assignment of Life Policies.

**Washington Law Reporter.** Vol. 19.

No. 47. Bailor Recovering Goods Bailed.

**Albany Law Journal.** Vol. 44.

No. 19. Tilden Will Trust.

No. 20. New Penal Code of Italy.

No. 21. Election Expenses of Judges.

No. 22. Judicial Evolution.

**Green Bag.** Vol. III. Boston.

No. 11. Supreme Court of New Jersey [with portraits]; Legal Education; Right to Privacy; Identification of Criminals by Measurement; First Offences.

**Chicago Legal News.** Vol. XXIV.

No. 13. Woman Suffrage; Directing a Verdict.

# HARVARD LAW REVIEW.

---

VOL. V.

JANUARY 15, 1892.

No. 6.

---

## THE JURY AND ITS DEVELOPMENT.

---

### I.

IN giving an account of early Germanic conceptions and modes of "trial," and their development in English judicature (5 Harv. L. Rev. 45; 4 *ib.* 156-9), I traced them down into modern times, and asked, "What, meantime, had been happening to the jury?" Let me now try to answer that question in some way, such as may be possible within the narrow limits that can be allowed in this magazine. Of the pedigree of the jury, as growing out of certain practices in public administration inherited by the Normans from the Frankish kings and brought to England at the Conquest, something was said in the paper just referred to. I will now attempt, *first*, to trace this earlier history and transmigration more definitely; *second*, when once we find the jury fairly on its legs in England, in the twelfth century, and reach the records, text-books, and, later, the reports, that give material for more accurate judgments, I will endeavor to follow the development of the jury through the later seven centuries to our own time. Such an undertaking must be executed in a very summary manner. It will be easier to treat the matter so, because I am writing with the main purpose of throwing light upon the English "law of evidence," which is the child of the jury, and not of stating fully the history of that institution.

I. 1. "The capitularies and documents of the Carlovingian period," says Brunner (Schw. 84), "have a procedure unknown to the old Germanic law, which has the technical name of inqui-

sitio. The characteristic of it is that the judge summons a number of the members of the community, selected by him as having presumably a knowledge of the facts in question, and takes of them a promise to declare the truth on the questions to be put by him. . . . This inquisition . . . was applied both in legal controversy and in administration, and we must observe that the departments of administration and justice were then considerably united." After the conquest of Neustria by Rollo the Norman, in 912, that province, although having new rulers, retained its old institutions. As it has been well observed, where the laws of the conqueror, the Normans, were so nearly related in their basis to those of the region to which they had come, the two "could not long exist by the side of each other. The less cultivated must be absorbed by the other, and the narrower the fundamental difference the quicker the process of absorption" (Schw. 129-30). Thus the Norman law was mainly Frankish law; and with the rest we find there the inquisition.

Where royal power was vigorous, as among the Franks, it required safer and directer ways of settling those matters of fact on which its revenues depended than the rude, superstitious, one-sided methods which were followed in the popular courts. In a capitulary of Louis le Débonnaire, in 829,<sup>1</sup> it is ordered that every inquiry relating to the royal fisc shall be made, not by witnesses brought forward [by the party], but *per illos qui in eo comitatu meliores et veraciores esse cognoscuntur*, — *per illorum testimonium inquisitio fiat, et juxta quod illi inde testificati fuerint, vel continentur vel reddantur*. This, it will be noticed, is not merely ascertaining facts, it is determining controversy by a mode of "trial;" taxes are laid, services exacted, personal status fixed, on the sworn answer of selected persons of a certain neighborhood. Such persons were likely to know who was in possession of neighboring land and by what title; they knew the *consuetudines* of the region, the free or servile status of the neighbors, their birth, death, or marriage. An enlightened principle had now come in as regards revenue which was likely to extend and did extend to judicature, for that was only another part of royal administration.<sup>2</sup>

<sup>1</sup> Baluze, i. 673, vi.; Anc. Lois Franc. i. 69; Brunner, Schw. 88, note.

<sup>2</sup> "So intimate is the connection of judicature with finance under the Norman kings that we scarcely need the comments of the historians to guide us to the conclusion that it was mainly for the sake of the profits that justice was administered at all." Stubbs, Const. Hist. Eng. i. 385-6.



Only the crown, the royal or ducal power, could have accomplished so great an innovation as this (Brunner, Schw. 255-62). The popular courts were hopelessly caught in the web of custom; within narrow limits they moved forever round and round in the ancient track. The crown alone could compel parties who wished to abide by the old formal procedure to give it up, or enforce the attendance of the community witnesses who made up the inquest, or compel them to take an oath. The popular law had left it to the parties to produce their witnesses; and the maxim that only royal authority could require a man to take an oath was what made and kept trial by jury the special possession of the royal courts. Only such as received the power by delegation from the crown, as the Church, great men, or royal officials presiding over popular courts, could try in this way. All this is but an illustration of the fact, as Maine has said (*Early Law and Custom*, c. vi.), that in early times the king was the great law-reformer. Beginning as an aid and supporter of the popular courts, enforcing their decisions, and exercising an "ultimate residuary authority" in correcting their errors, the king administered "that royal justice which had never been dissociated from him . . . [and] was ever waxing while the popular justice was waning. . . . In those days whatever answered to what we now call the spirit of reform was confined to the king and his advisers; he alone introduced comparative gentleness into the law and simplified its procedure. . . . [This] was once the most valuable and indeed the most indispensable of all reforming agencies; but at length its course was run, and in nearly all civilized societies its inheritance has devolved upon elective legislatures."

2. In the latter half of the eleventh century the Normans brought a strong type of this royal power to England. They brought also the inquisition. Through the whole of the next century and more, the growth and use of it in the Norman dominions on both sides of the channel were much the same. But from the beginning of the thirteenth century, when John lost his southern territory to the French, the inquisition, mainly dying slowly out in France, began its peculiar, astonishing development in England. In trying to follow its English history we remark at once that for more than a century there is little clear, authoritative information. We get our knowledge mainly from the scattered accounts of cases in *Doomsday Book*, and in *Chronicles* and

Histories. These have been collected by a competent and careful hand in the *Placita Anglo-Normannica* of Dr. Bigelow.<sup>1</sup> The noble series of extant English judicial records does not begin until 1194 (Mich. 6 Ric. I.)<sup>2</sup> Our first law treatise, Glanville, was written not before 1187.<sup>3</sup> Our existing law reports begin not earlier than two centuries and a quarter after the Conquest, in 1292.<sup>4</sup>

(a) During this earliest period there are many illustrations of the use of the inquisition in ordinary administration. The conspicuous case is that of the compilation of Domesday Book in 1085-6. This was accomplished by a commission, making inquiry throughout England, by sworn men of each neighborhood, responsible and acquainted with the facts. Domesday is a record of all sorts of details relating to local customs, and the possession, tenure, and taxable capacity of the land owners. "Questions of title to land and services, and disputes over the status of persons were of constant occurrence before the commissioners, and the results are briefly stated."<sup>5</sup> Incidentally much else came in, as where an inquest<sup>6</sup> in their answers relate the proceedings of a litigation in the popular court, and how, upon Ralph's failure to appear on a day fixed by the viscount, the men of the hundred had adjudged (*diindicaverant*) the land to his adversary. The disputes and offers of proof before the Commissioners themselves are sometimes reported.<sup>7</sup>

Of the use of the inquisition in judicature there is an instance,

<sup>1</sup> Boston: Little, Brown, & Co. 1879. "This volume [Preface, p. iii] is not a selection of cases, but contains all, of a temporal nature, that are of any value in the known legal monuments of the period."

<sup>2</sup> *Rotuli Curiae Regis*, i., introd. i-ii.

<sup>3</sup> *Glanvilla, Tractatus de Legibus et Consuetudinibus Regni Angliae*, Lib. viii. c. 3. A fine is cited here as enrolled on the Monday next after the feast of Simon and Jude, in 33 H. II.; this feast was Oct. 28, 1187. I do not take account of the rather special treatise known as *Dialogus de Scaccario*, written not before 1176-7. Even while I am writing comes something newly discovered, — "what we may believe to be our oldest legal text-book" (Maitland, in *Law Quart. Rev.* viii. 75), viz., the "*Quadripartitus*, an English law book of 1114," edited by Dr. Liebermann (Halle, 1892).

<sup>4</sup> Y. B. 20 & 21 Edw. I.

<sup>5</sup> Big. Pl. Ang. Norm. xlix; Palg. Com. i, 271-3. "Not even an ox nor a cow, nor a swine was there left which was not set down in his records," says a Saxon chronicler quoted by Palgrave.

<sup>6</sup> *Ranulf v. Ralph*, Big. Pl. A. N. 307, citing Domesday, i. 424.

<sup>7</sup> Illustrations of this sort of thing, taken from Domesday, may be seen in Big. Pl. Ang. Norm. pp. 37-61, and *ib.* 293-307.

in 1080, or soon afterward (Big. Pl. A. N. 24), when, in order to settle a litigation as to certain lands held of the Church of Ely, turning on the question of who held when Edward the Confessor died, the king directs the summoning of three shires and various nobles, and orders that out of these, several (*plures*) English be chosen to tell, under oath, the facts; and it is directed (with certain qualifications), that matters shall be adjusted according to the answers. Of uncertain date in the reign of the Conqueror, who died in September, 1087, is the case of Bishop Gundulf, of Rochester, *v.* Pichot, Viscount of Cambridge,<sup>1</sup> in which on a great controversy as to whether certain lands belonged to the king or "St. Andrew," the king ordered that it be referred to the judgment of all the men of the county,—in other words, to the county court. The county awarded it to the king. The presiding officer, Odo, Bishop of Bayeux, doubted this award, and directed that the county should choose twelve of their number to confirm it by oath.<sup>2</sup> These retired, and then returned and swore to what had been said by the county court. A year afterwards a monk who had once been steward of the region in question, and knew this to be false, raised some question about it; this resulted in confessions of perjury from the one who led in the oath, and from another; and in the condemnation and punishment of all who swore.<sup>3</sup> This case shows the Anglo-Saxon procedure, that of the Germanic popular courts, viz., judgment by the whole assembly. But it also shows the interference of the king's representative, and a resort to an inquest of twelve, chosen under his orders by the county from its own members, and speaking under oath. In the reign of William Rufus, in 1099<sup>4</sup> we have what has been called "the earliest record of anything like a modern judicial iter by the royal justiciars." It does not appear by what methods the judges proceeded. In another case a

<sup>1</sup> Big. Pl. A. N. 34; s. c. *Essays in Anglo-Saxon Law*, 374 (with the date 1072-1082), Reeves (*Hist. Eng. Law*, Finl. ed. 137) refers to this as being "the earliest mention of anything like a jury."

<sup>2</sup> So in the reign of Henry I. (1100-1135) the king in his writ gives express authority to require the oath, if dissatisfied with the unsworn answer. "*Ite et videte divisas . . . et facite recognoscere per probos homines de comitatu et dividere. . . . Et si bene eis non credideritis, sacramento confirment quod dixerint.*" Palg. Eng. Com. ii. 184, note; s. c. Big. Pl. A. N. 139.

<sup>3</sup> Those who had not confessed were adjudged perjured, *quandoquidem ille, postquam alii juraverant se perjurum esse fatebatur.*

<sup>4</sup> The King *v.* The Abbot of Tavistock, Big. Pl. A. N. 69.

writ of William Rufus, of uncertain date, directs the viscount to assemble the shire and take its judgment on a dispute as to lands, and to adjust the matter accordingly. A writ of execution in the same case indicates that it was decided by a jury, — *sicut testimoniata et jurata fuit*.

In the reign of Henry I., in 1122, the king directs that a controversy as to land be referred to the declaration of men of a certain neighborhood. Seven hundred were assembled, and the viscount of Dorset and Somerset presided. Sixteen men swore *se veram affirmationem facturos de inquisitione terrae illius . . . quorum assertioni cuncti adquiescentes . . . sua jura consequentibus adjudicabant, &c.* The names of those who swore are added. We see here again the hundred court giving the judgment upon the statement of those members who were chosen to swear.<sup>1</sup>

(b) With the reign of Henry II. (1154–1189) we reach the period when all this irregular, unorganized use of the inquisition begins to take permanent shape at the hands of a great and sagacious king. Through the text of certain of his ordinances (assises), and through the treatise ascribed to Glanville, the last of his chief justices, we shall soon get more definite instruction. A chronicler describes an early controversy in this reign, of the year 1158 (Big. Pl. A. N. 198), between the men of Wallingford and Oxford, and the Abbot of Abingdon, as to the right to a market. The king, being in Normandy, had been persuaded to forbid the defendant to sell any but small articles until his return. The defendant asserted full rights of market. The king, on further complaint made to him in Normandy, directed the Earl of Leicester (Chief Justiciar from 1154 to 1162) to assemble the county of Berkshire and cause twenty-four of the older men to be chosen to answer on oath; if they should swear that the defendant had full market in the time of Henry I. he should have it, otherwise not. This resulted in favor of the defendant. The plaintiffs then went to the king, who had returned, and complained that this oath was false, and that among those who swore had been some of the defendant's men. The king thereupon ordered an assembly of the Wallingford men and of the whole county of Berkshire at Oxford, before the justices, and that oath should be made to the truth by the

---

<sup>1</sup> Palg. Com. ii. 183; Big. Pl. A. N. 119.

older men chosen by both sides (*ex utraque parte*), excepting that none should belong to the Abbey. At this assembly the jury were separated (*congregati . . . universi, et segregati qui jurarent*), and they differed — the Wallingford men swearing that there was only a market for bread and ale, the Oxford men for more things, but not a full market; and the men of the county, that it was a full market, with possibly one exception. The Earl of Leicester, who presided (*qui justitia et judex aderat*), was unwilling to give judgment on these differing statements, but reported matters to the king, adding the information that he himself had lived at Abingdon when he was a boy, and that he had seen a full market there in the time of King Henry I. This satisfied the king (*tanti viri testimonio delectatus*), and he decided in favor of the defendant.

(c) But we had better leave now these unauthoritative reports of the chroniclers<sup>1</sup> and wait, as regards cases, until solid ground is reached in the judicial records, half a century later. Meantime it will be profitable to consider two or three things.

(1.) It is interesting to remark how the English kings, in their capacity as Dukes of Normandy, were using there this same machinery. While they had brought it to England, they had also left it at home.<sup>2</sup> Dr. Brunner speaks of having carefully examined many Norman documents of the twelfth century, little studied before and never printed, and remarks (Schw. 135) that they enable one to contradict the view that Anglo-Norman law had taken the lead and Norman law followed. Up to Glanville the English law was constantly fructified from the Norman. Henry was Duke of Normandy before he was Justiciary and then King of England. It was not, he adds, until near the end of the union between the two countries (in 1205) that England took the lead. It is not surprising, then, to find that Henry II. began the work of developing and organizing the inquisition as Duke of Normandy before he came to the English throne, and as early as the

---

<sup>1</sup> The chroniclers preserve many valuable documents. As regards their narratives we have to remember their bias and their ignorance of technical law, recalling Coke's warning at the beginning of the third volume of his reports: "And for that it is hard for a man to report any part or branch of any art or science justly and truly which he professeth not, and impossible to make a just and true relation of any thing that he understands not, I pray thee beware of chronicle law," etc.

<sup>2</sup> Brunner, Schw. 148, 207-8.

year 1152.<sup>1</sup> This work lay in establishing it as a right to have this method of proof in certain classes of cases, and in making it obligatory. Before this, it had been granted merely as matter of royal favor in particular instances; it now became, in some cases, matter of right to have the king's writ ordering it.<sup>2</sup> The phrase now became "recognition" rather than "inquisition," — the two terms in reality importing two aspects of the same thing, one, the inquiry, the other, the answer.

These "recognitions" were so many new modes of trial on particular questions, established by a dead lift of royal power. In the case of the "great assise" this trial was optional with the tenant, but not with the demandant. As regards the other recognitions they were required, in specified sorts of cases, — equally obligatory upon both parties. In theory, such recognitions might have been established in other cases, *e. g.*, in criminal matters, by the same authority. If one should be inclined to wonder why this was not done he should bethink him of the extraordinary nature of the actual achievement. The real wonder is that so much was done; for the introduction of a compulsory procedure of this sort was very foreign to the conceptions of the older law. By that, men had "tried" their own cases. To put upon a man who had the right to go to the proof, instead of the *probatio, defencio, purgatio*, of the older law, where he produced the persons or the things that cleared him, the necessity of submitting himself to the test of what a set of strangers might say, witnesses selected by a public officer, — this was a wonderful thing.<sup>3</sup>

It was a portentous thing that any ruler should set himself above the old *lex et consuetudo*. Nearly a century and a half later, where we find the king claiming this power, we see also how firmly he is resisted. In 1291-2 it was sought, in ascertaining certain facts, to put some great men to their oath. They all

<sup>1</sup> Brunner, Schw. 300-304. Brunner here makes the interesting remark that "the need of innovations must have already made itself felt, for the reason that a dangerous rival to the rude and inelastic procedure of the temporal courts was growing up, in the canon law. . . . It may be therefore be regarded as no mere coincidence that Henry II., the reformer of procedure, was the man who first succeeded in forcing the ecclesiastical jurisdiction into narrower limits." See the remark of Berekford, J., in 1303 (Y. B. 31 Edw. I., 492).

<sup>2</sup> Brunner, Schw. 304-5.

<sup>3</sup> A friend reminds me of the many proofs, such as outlawry and distress, that survived even to modern times, of the inability of the old law to compel a man directly to submit to judicial authority.

answered that it was unheard of that they or their ancestors should be compelled to take an oath. It was set forth to them that in many cases, for the common welfare, the king is above the *leges et consuetudines in regno suo usitatas*; and thereupon many times was the book held out to them, but they refused. (Pl. Abb. 227, col. 2.) In old times this denial of the *king's* power of compulsion was a denial of such power anywhere. And it is in this sense probably that we are to understand Horne, in the "Mirror," a little later (c. v. s. 1), when he said, in enumerating abuses: "*La premier et la souveraigne abusion est que le Roy est oustre la ley.*" Horne thought it an abuse that one shouldn't be allowed to try his case by battle or the ordeal. He says this in terms. And again, as to a class of criminal cases: "It is an abuse that the justices drive a true man to be tried by the country when he offers to defend himself against the approver by battle."

(2.) Of the phrases that we meet so often, *recognitio* and *assisa*, some illustration may be convenient. The solemn declaration, in certain matters affecting the clergy, made in 1164 and ordinarily called the Constitutions of Clarendon, is itself styled, in the document, *ista recordatio vel recognitio*; while in chapter ix. it provides for settling certain cases *recognitione duodecim legalium hominum*. In the Assise of Northampton (1176), at § 4, relating to the writ of *mortdancestor*, it is directed that the justices cause a *percognitionem* to be taken by twelve lawful men, *et sicut recognitum fuerit ita*, etc.

The word "*recognitio*," meaning thus a solemn acknowledgment, declaration, or answer, came to be mainly limited to "the inquisitions which under the ducal ordinance (*secundum assisam*) were started by a ducal writ."<sup>1</sup> Of the term "*assise*," Brunner (Schw. 299) says, "In England the technical expression '*assisa*' got established for recognition in the narrower sense. *Assisa* means, in the first place, the *thing*, the assembly, as well judicial as legislative. In its extended sense, it means what belongs to such an assembly, the judgment or the ordinance. As to these specific assises which introduced the recognitions, the term '*assise*' has passed over to them." Of the use of the word "*assisa*" as meaning the ordinance itself, we see illustrations both in the title and the text of the assises of Clarendon and Northampton,<sup>2</sup> of the Assise of Arms

<sup>1</sup> Brunner, Schw. 293-4. And see a French document of 1267, specifically giving this meaning to the word, *ib.* 294-5.

<sup>2</sup> Ass. North. s. 5.

(1181) and the Assise of the Forest (1184). *Item iustitiae . . . faciant fieri recognitionem de dissaisinis factis super assisam, etc. Haec est assisa . . . de foresta, etc.*<sup>1</sup> On the other hand, the use of it in the sense of a particular remedy, or form of action, or mode of proceeding, and also in the sense of the tribunal, the recognitors, is sufficiently illustrated if we recall the Magna Assisa, or the several assises of Novel Disseisin, Mortdancestor and the rest, or the common expressions, *cadit assisa in iuratum* and the like.

(3.) These ordinances of Henry II. (or, perhaps, as it has been conjectured, only a single ordinance applicable to a variety of cases,) are not preserved; but the character of them as acts of royal legislation sufficiently appears in the ordinances already named,<sup>2</sup> as well as in Glanville<sup>3</sup> and elsewhere. Of the proceedings under them, also called assises and recognitions, Reeves (Finl. ed., i. 223-232), following Glanville, or rather paraphrasing him with comment, mentions eight. Of these only two, those of mortdancestor and novel disseisin, went on under original writs. That these proceedings originated with Henry II. is neatly indicated by a charter of King John, granted in 1202, to the church of Beverly, and recited in a later *Inspeximus*, confirming the rights of that church as against any *assisas vel recognitiones vel constitutiones postea factas*; so far as recognitions or assises are necessary as touching what belongs to the *praepositus* of Beverly, they are to be held in his court, where such matters were pleaded *tempore regis Henrici patris nostri, vel tempore Henrici Regis avi patris nostri, antequam recognitiones vel assisae in regno nostro essent constitutae*.<sup>4</sup> The assises or recognitions, *i. e.*, the inquisitions provided for by royal ordinance, compulsory and obtainable as of right, existed, as was said before, only in a limited number of cases. But the old method of obtaining this mode of relief by special permission in other cases, still held; and it was had by consent. Having regard to the powerful favor of the crown, and to the experience of the advantages of this national mode of determining questions of fact, as compared with the duel and the old one-sided formal proof, one might easily guess

<sup>1</sup> Ass. Forest. See also Brunner, Schw. 302.

<sup>2</sup> Reeves, Hist. Com. Law (Finl. ed.), 139, 185, 187 and note, 223.

<sup>3</sup> Stubbs, Charters (6th ed.), 135, 140, 150, 156.

<sup>4</sup> ii. c. 7, and c. 19, and xiii. c. 1.

<sup>5</sup> Houard, Anc. Loix, ii, 287-8; cited by Brunner, Schw. 301.



at the great and rapid extension of it that followed. Questions raised by the *exceptio*, and other incidental matters, were largely disposed of in this way, either by consent of parties or order of court; but to some extent the body of men thus procured was in early times distinguished by a different name from that which assembled under the king's ordinance; it appears as the *jurata*.<sup>1</sup> Where the ordinance did not extend, and where a party would not consent to a *jurata*, the old formal methods of proof prevailed; and some of them continued for centuries.<sup>2</sup> But this again, among other causes, led to a resort to new forms of action, and in these the only mode of trial was the jury. By its intrinsic fairness as contrasted with older modes, and by the favor of the crown and the judges, it grew fast to be regarded as the one regular common-law mode of trial, always to be had when no other was fixed.<sup>3</sup>

(4.) Some further mention should be made of the fragmentary legislation of this reign.<sup>4</sup> In the Constitutions of Clarendon, in 1164, — *ista recordatio vel recognitio cujusdam partis consuetudinum et libertatum et dignitatum antecessorum suorum*, — matters between the king and the church were regulated. In c. i controversies about presentation and advowson (*de advocacione et presentatione ecclesiarum*) are placed under the jurisdiction of the King's court, — "for the decision of which the assise of darrein presentment was issued, the only vestiges of which [*i. e.*, of the assise or ordinance itself] are preserved in Glanville."<sup>5</sup> In c. vi. a jury of accusation is provided for, — *faciet jurare duodecim legales homines de vicineto . . . quod inde veritatem secundum conscientiam suam manifestabunt*. In c. ix. the assise *Utrum* appeared, — *recognitione duodecim legalium hominum*.<sup>6</sup> In the Assise of Clarendon, in 1166, provision is made for taking inquests throughout England by local juries of accusation, and for the trial of the chief cases by the ordeal. Such juries are also required in the Inquest of Sheriffs (1170), and the Assise of Arms (1181). In

<sup>1</sup> See, however, Mr. Pike's learned consideration of this subject in Y. B. 12 & 13 Edw. III. pp. xxxix-lxx.

<sup>2</sup> Harv. L. Rev. v. 45.

<sup>3</sup> In 1275 (Stat. West. I. c. 12), one accused of felony, and refusing to put himself on a jury, is dealt with as refusing "the common law of the land."

<sup>4</sup> For this see Stubbs, Charters.

<sup>5</sup> Stubbs, Charters (6th ed.), 136.

<sup>6</sup> See Professor Maitland's interesting article in the Law Quarterly Review, vii. 354. 359.

the Assise of Northampton (1176), "a reissue and expansion of the Assise of Clarendon . . . drawn up in the form of instructions to the six committees of judges who were to visit the circuits now marked out," the fourth article provides for continuing in the heir of a freeholder the seisin that his father had, and, if the lord refuse it, for what appears to be the assise of mortdancestor, — *Fustitiae . . . faciant inde fieri percognitionem per duodecim legales homines qualem seisinam defunctus inde habuit die quo fuit vivus et mortuus: et sicut recognitum fuerit, ita haeredibus ejus restituant.* Article five requires the taking of assises of novel disseisin; or, to give it just as it is expressed, the taking of a recognition on the Assise (*super Assisam*),<sup>1</sup> of disseisins made since the king came to England after the peace between him and his son.

(5.) To the end of the period now under consideration belongs Glanville. In this book we find frequent mention of the *assisa*, *recognitio*, *jurata*, *patria*, *visinetum*, as a form of proof, — in other words, of trial by jury. Glanville takes up first the writ of right (Lib. i. c. 5), and after dealing with a variety of preliminary matters, such as the essoins, getting the parties into court and the plaintiff through his declaration, he tells us (Lib. ii. c. 3) that the tenant now has his election to defend himself *per duellum*, *vel ponere se inde in magnam assisam domini Regis*<sup>2</sup> *et petere recognitionem quis eorum majus jus habet in terra illa.* If the tenant puts himself on the great assise, and the plaintiff assents in court, he cannot withdraw. If he does not assent, he must show a good reason, as that the parties are both descended from the same line as the inheritance;<sup>3</sup> and if this be disputed he must establish it (c. 6). Glanville here pauses (c. 7) to praise the assise in the well-known passage in which this "*constitutio*" is attributed to the royal bounty, and is contrasted with the duel as regards its justice, reasonable-

<sup>1</sup> In view of the use of this phrase here and in Glanville, as referring to legislative ordinances no longer extant, it is interesting to notice it in a record of 1201 as meaning the Assise of Clarendon: *Nicholaus purget se per aquam, per assisam*, — "Let Nicholas purge himself by [the ordeal of] water according to the Assise." Seld. Soc. Pub. 1, p. 1. This Assise ("The most important document, of the nature of law or edict, that has appeared since the Conquest," Stubbs, Const. Hist. i. 469) is known to us only because Palgrave discovered it sixty years ago in a MSS. copy of Glanville in the British Museum. Pal. Com. ii 166.

<sup>2</sup> The conception here appears to be that of putting himself on the great ordinance of the King which gave the *recognitio* claimed in the next words.

<sup>3</sup> See Stat. *de magnis assis et duellis* (*inc. temp.*) St. Realm, i. 218.

ness, speed, and economy.<sup>1</sup> He goes on to explain that the tenant, appealing from the local court to the king's court, so as to have the benefit of this assise, may have a writ of prohibition to the lower tribunal.

It was when the proceedings under the original writ had taken this turn that the plaintiff might have his auxiliary writ (cc. 10 and 11) for summoning four knights of the county and neighborhood to choose twelve others of the same neighborhood *qui melius veritatem sciant, ad recognoscendum super sacramentum suum utrum M. an R. majus jus habeat*. The details of this election and of the summoning of the twelve knights are then given (cc. 12, 14, 15).

It is remarkable how free from technicality and how liberal in tone are the provisions of this ordinance of the king and the practice under it, as explained by Glanville (c. 12). When once the twelve knights have assembled (cc. 17, 18), it is first ascertained by their oath whether any of them are ignorant of the fact (*rei veritatem*). If there be any such, they are rejected and others chosen. If the twelve differ in their verdict, others are added until there are twelve who agree, on one side or the other. The knowledge required of them is their own perception, or what their fathers have told them, or what they may trust as fully as their own knowledge (*per proprium visum et auditum . . . vel per verba patrum suorum, et per talia quibus fidem teneantur habere ut propriis*). The twelve knights may either say, directly and shortly, that one party or the other has the greater right, or merely set forth the facts, and thus enable the justices to say it,—what we call a special verdict. The interesting fact is stated (c. 19) that the king's ordinance provides a punishment for the false swearing of these persons; viz., the loss of all chattels and movable goods, but not the freehold. They are also to be imprisoned for at least a year, and to lose their *legem terrae*, being no longer the *legalis homo*, and becoming for ever infamous.<sup>2</sup>

It will be observed that the writ of right, the only one thus far considered by Glanville, had no necessary relation to the new

<sup>1</sup> Harv. L. Rev. v. 67; Reeves, Hist. Com. Law, Finl. ed. 187-8. An interesting question exists as to whether the word *magna* belongs in this passage. Reeves, i. 187, note; Beames's Glanv. 54, note. Whether it belongs here or not, it is found elsewhere in Glanville, and in our other early books, as designating this particular recognition.

<sup>2</sup> LEGALIS, in jure nostro de eo dicitur qui stat rectus in curia, non ex lex seu ulagatus, non excommunicatus, vel infamis &c., sed qui et in lege postulet et postuletur. Hoc sensu vulgare illud in formulis juridicis, *probi et legales homines*. Spelman, Gloss.

modes of trial ; the regular trial was the old one, the duel. It was only when the tenant claimed the benefit of the statute that the case was tried by the inquisition, or, as it is more usually called in this relation, the recognition. The writ which secured this was merely an auxiliary writ of summons obtained by the plaintiff to meet the emergency in his case which had thus developed. But Glanville, later on (lib. xiii. c. 1), speaks in detail of a different thing when he comes to possessory writs : " Now we are to speak of the usual proceedings where seisin only is in question. And since these usually go forward by a recognition, by favor of that ordinance of the kingdom which is called the assise (*ex beneficio constitutionis regni que assisa nominatur*), it remains to speak of the various recognitions." Eight recognitions are then named (c. 2), viz. : *de morte antecessoris, de ultima presentatione, utrum tenementum sit feudum ecclesiasticum vel laicum, utrum seisitus de feodo vel de vadio, utrum sit infra etatem*<sup>1</sup> (c. 16), *utrum seisitus de feodo vel de warda* (c. 14), *utrum presentaverit occasione feodi vel warde, de nova disseisina* ; — the writs for these are given in succession, and all but the first and the last are merely auxiliary writs, called out, as in the case of the *magna assisa*, incidentally, in proceedings under some other writ. Glanville also plainly says that in other ways the recognition is reached ; as regards incidental points recognitions are ordered, sometimes by assent of the parties and sometimes by the order of the court (*et si que sunt similia que in curia frequenter emergunt presentibus partibus, tunc ex consensu ipsarum partium, tunc etiam, de consilio curie consideratur ad aliquam controversiam terminandam*). In dealing with the first of these writs, Glanville explains, once for all, the procedure. The writ directs the viscount to summon twelve *liberos et legales homines de visineto de illa villa* to appear, ready on their oath *recognoscere si . . . et interim terram illam videat . . .* (*ib.* c. 3). The viscount is to select these men, in the presence of the parties, if they choose to attend (*ib.* c. 5). Only two essoins (excuses for delay) are allowed in any possessory recognition, and none at all in the writ of novel disseisin. In considering various dilatory pleas to which the tenant may resort, it is said that the question of fact thus raised may be disposed of by a resort *ad duellum, vel ad aliam usitatam probationem*. As regards the mode in which the twelve are to arrive at their verdict

<sup>1</sup> In this case the recognition is by eight.

Glanville simply says (c. 11) it is *sub forma prescripta in hoc libro*, — meaning, perhaps, the explanations about the writ of right in the second book. It is only there that he gives any such explanations.

Glanville's last book (xiv.) deals with criminal cases, — *de criminalibus restat tractandum*. Here, as yet, the jury has penetrated little; but here also it has come. The ordinary common-law (*per legem terrae*) mode of accusation is the private one, by appeal, and the ordinary mode of trial is battle or the ordeal; for compurgation in the king's courts seems to have disappeared by the Assise of Clarendon. But sometimes one is accused by "public fame;" *i. e.*, the accusing jury. In this case the judge must inquire carefully into the basis of this accusation *per multas et varias inquisitiones et interrogationes coram justic' faciendas inquireretur rei veritas, et id ex verisimilibus rerum indiciis et conjecturis, nunc pro eo nunc contra eum qui accusatur facientibus*.<sup>1</sup> Sometimes the accused has an election whether to submit to the ordeal, and sometimes he is forced to it; as in homicide, where he has been taken in flight by a pursuing crowd, if this be attested in court by a jury, *si . . . hoc per juratam patrie fuerit in curia legitime testatum* (c. 3; see also c. 6). One may decline battle for the reason of being sixty years old or over, or being maimed. But then he is driven to the ordeal (c. 1).

Glanville often, throughout his work, speaks of referring incidental questions *ad visinetum*, of determining them *per juratam patriae vel visineti*. What has already been said may serve to show that this was sometimes under the king's ordinance (*juxta assisam*) by a recognition, and sometimes that it came about as a consequence of the judge's control over procedure, by agreement of parties, or by the outright award of the court.<sup>2</sup>

II. We now come to the time when there are printed records, and cases can be cited. Henceforward we are on more solid ground, and may hope to trace more clearly the development of

<sup>1</sup> Such was the office, in civil cases, of the *secta* — to make a charge probable. Harv. L. Rev. v. 47-51. These preliminary inquiries must not be confounded with the trial; Stephen appears to fall into this error. Hist. Crim. Law, i. 259-60.

<sup>2</sup> This was done sometimes by the mere order of the king. In 1200 (Rot. Cur. Reg. ii. 189), an entry on the judicial rolls begins abruptly, *Jurata venit recognitura, &c.* The jury finds that the sons of S. are the inheritors of a certain estate, *ut eis videtur*; and it is added, "*notandum* that this inquisition was made by order of the king, not by judgment of the court *vel secundum consuetudinem regni*."

things. A student is struck at once with the rapid growth of the new mode of trial during the next century. The evil practice of exacting a large and uncertain fee for granting a recognition, even when it was matter of right,<sup>1</sup> which continued throughout the twelfth century, was forbidden by John's Magna Carta, in 1215. The Barons had demanded in their "Articles,"<sup>2</sup> *Ne jus vendatur, vel differatur vel vetitum sit*; and in art. 40 of the Charter the king had promised "*Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam*." Then the multiplication, in civil cases, of new writs and forms of action available as of right, and all of them calling for a trial by jury, gave it a great increase. As to the king's right to issue new writs, the abridgment of the right in 1258, and the enactment in 1285 of that fruitful provision (St. Westm. II. c. 24) whereby the clerks in chancery were empowered to issue new writs in *consimili casu*,—authorizing actions on the case and providing the channels through which a vast proportion of the flood of subsequent litigation has flowed,—I can merely allude to these things.<sup>3</sup> Even without all this and before it, there had been an extraordinary growth; for instance, trespass, occasionally resorted to in John's reign or earlier,<sup>4</sup> became apparently a writ of course about the middle of the thirteenth century; such, at any rate, is the opinion of some of our best scholars.<sup>5</sup> In this, as well as in all cases which were not covered by established rules, the jury was the mode of trial. "And since in a plea of trespass the defendant can hardly escape making his defence by the country, the justice, by consent of parties, shall make inquiry of the truth by lawful inquest," says the Statute of Wales in 1284 (c. xi).<sup>6</sup> "To avoid the perilous risk of battle it is better to proceed by our writs of trespass than by appeals," says Britton (A.D. 1291-2).<sup>7</sup> In 1304 (Y. B. 32 & 33 Edw. I.

<sup>1</sup> Big. Hist. Proc. 187-90.

<sup>2</sup> No. 30; Stubbs, Charters (6th ed.), 293.

<sup>3</sup> See Big. Pl. A. N. Introd. xxviii-xxx.

<sup>4</sup> Big. Proc. 160.

<sup>5</sup> Professor Ames in Harv. Law Rev. iii. 29, note; confirmed by Professor Maitland in his valuable article on the "Register of Original Writs," *ib.* 177-9, 217: "At the end of the Baron's war . . . we suddenly come upon a large crop of such actions."

<sup>6</sup> 1 St. Realm, p. 66.

<sup>7</sup> f. 49; Nichols, i. 123. A learned friend suggests that by the middle of the thirteenth century there were no cases where a defendant on his trial might not regularly have a jury if he applied for it, and no case where a plaintiff might not have it except debt, detinue, and the grand assise,—allowing, of course, for situations where documents were the proper mode of trial.

318-20), battle was offered and accepted in trespass, but the court refused to allow it.

But the inquisition had its most interesting extension, and the one which it will be most profitable to trace, in criminal cases. Of this a very interesting account is given by Brunner (Schw. 469-474). Here, as in civil cases, the incidental questions raised by an *exceptio* were often referred, by consent of the parties, or by the king's grace obtained by the offer of money, to an inquisition. Many instances of such offers for a jury to try the question, upon a special plea in criminal cases, are found in the reign of John. The commonest case of this sort, so far as our printed records show, was the plea, on an appeal, that it was brought maliciously, to disinherit or otherwise injure the appellee, whose innocence is also alleged,—the *exceptio de otio et atia*.<sup>1</sup> These pleas often involved practically a decision of the main question of guilt or innocence. By the Magna Carta of King John (art. 36) such writs were no longer to be sold and bought but given as of right.<sup>2</sup> In this way, then, it seems to have been possible, even before the decree of the Fourth Lateran Council, in this same year of 1215, to apply the jury to criminal cases whenever the accused asked for it. But how if he did not ask for it? The Assise of Clarendon, in 1166, with its apparatus of an accusing jury and a trial by ordeal is thought to have done away in the king's courts with compurgation as a mode of trial for crime; and now the Lateran Council, in forbidding ecclesiastics to take part in trial by ordeal, was deemed to have forbidden that mode of trial, as well in England as in all other countries where the authority of the Council was recognized.<sup>3</sup>

<sup>1</sup> Instances of this, in 1200, may be seen in Rot. Cur. Reg. ii. 30, 97, 230, and 265; the last-named case reappears, in 1207, in Seld. Soc. Pub. i., case 54. In this last volume interesting instances, of the years 1202-5, are found, at cases 81, 87, 91, 92. See also case 161, in 1221. In case 79 (1203), on a plea to an appeal, of a previous concord and settlement, the appellee offers two marks to the king for an inquest, and has it.

<sup>2</sup> *Nichil detur vel capiatur de cetero pro brevi inquisitionis de vita vel membris sua gratis concedatur et non negetur.*

<sup>3</sup> "The next eyre . . . took place in the winter of 1218-19. The judges had already started on their journeys when an order of the king in council was sent round to them . . . : 'When you started on your eyre it was as yet undetermined what should be done with persons accused of crime, the Church having forbidden the ordeal. For the present we must rely very much on your discretion to act wisely according to the special circumstances of each case.' " The judges were then given certain general instructions: Persons charged with the graver crimes, who might do harm if allowed to abjure the realm, are to be imprisoned, without endangering life or limb. Those charged with less crimes, who

The judges would naturally turn to the inquest. But this had not been used heretofore in criminal cases without the consent of the accused; and the action of the judges took the course of gaining his consent and stimulating it. Somehow or other it eventually became the received opinion that one accused of crime could not be tried by the country unless he should plead and put himself on that mode of trial. It was so in Normandy;<sup>1</sup> and this may well suggest that the fundamental reason of it was one common to both countries; viz., the struggle of the old conceptions as to judicial authority in adjusting themselves to the new procedure. But there was an unsettled time at first, and some persons were tried by jury and hanged who never had consented to the jury.<sup>2</sup> There was ground for this course in the usages of the King's Court in both civil and criminal cases. If the tenant in a writ of right put himself on the grand assise, the question as regards the demandant was not whether he consented, but whether he had a good reason for refusing to consent. (Glanv. ii. 6.) So in the petty assises, there was no choice. As regards exceptions Britton tells us (f. 218 b), *en tels cas soit la assise tourné en juree, et en plusours autre cas, si les parties se assentent, et si noun, soit jugé contre cely qe assenter ne se voderá*. As we saw in Glanville, one might be compelled to the ordeal against his will. In the nature of things it could not really be left to the option of an accused person whether he would be tried or not. It is not strange then to find that the judges, using the large discretion confided to them by the crown after the Lateran Council, sometimes forced a jury upon an unwilling prisoner. The two cases cited by Emlyn in his note to Hale's Pleas of the Crown, which are above referred to, are clear instances of it. Seven cases in Gloucester, however, during the same iter in which these occurred, preserved by Maitland, are, as he says (Glouc. Pl. xxxix.), "provokingly inconclusive."

Maitland's researches among the rolls in preparing the "Select Pleas of the Crown" (A. D. 1200-1225), which make the first volume of the publications of the Selden Society, lead him to make (p. 99, note) the important remark regarding Emlyn's two cases,

---

would have been tried by the ordeal, may abjure the realm. In the case of small crimes there must be pledges to keep the peace. Maitland, Glouc. Pleas, xxxviii.

<sup>1</sup> Brunner, Schw. 474.

<sup>2</sup> Cases of this sort, of the period 1220-1222, may be found in Hale, Pl. Cr. ii. 322, note; s. c. Seld. Soc. Pub. i., cases 153, 157; Maitland Glouc. Pleas, xxix.



that "no other cases to the same effect have as yet been found." Yet Bracton's opinion seems to have been in accord with them. In very interesting passages (Lib. iii. cc. 21, 22), quoted by Maitland, Bracton argues for this doctrine on the analogy of what happens (citing two cases of 1226), in an appeal where the appellant is a woman, an old person, or one maimed. In such cases there can be no battle, and since the Lateran Council, no ordeal; the process is the jury, — *cogendus est igitur appellatus quod se defendat per patriam*. On an indictment, also, after describing the proceedings (143 b), in saying that these forms are to be followed in all cases of homicide, where one has put himself on an inquisition, his expressions are, *sive sponte, sive per cautelam inductus, sive per necessitatem*. None of Bracton's citations in this part of the work, viz. in the treatise *De Corona*, are later than 1231-2, except one of 1262, which appears to be an interpolation, and this is esteemed the oldest part of the book; but the full work is ascribed to the approximate date of 1259.<sup>1</sup> Down, then, to the middle of the thirteenth century, or later, it was thought possible by high authority, as well in criminal cases as in civil, to try a man by jury, or, at any rate, to convict him, whether he consented or not. But the doctrine was contrary to settled ideas, it was not an established one, the precedents were few, and it was supported rather on analogy than any body of direct authority. An obvious mode of compulsion, in case of refusal, was that of treating the party as confessing. There had, indeed, always been cases where one was hanged without any trial at all, as where a man was taken in the fact.<sup>2</sup> In 1222 (Br. N. B. ii., case 136), of two alleged robbers, one puts himself on a jury and is substantially acquitted. The other refuses; but it appears that he was found in possession of part of a tunic lately stolen, and *omnes de comitatu et de visneto* say that he is a thief, and has been in complicity with thieves, that he is not in frank-pledge, and has no lord to vouch for him,

<sup>1</sup> Twiss, Bracton, i. xiv, xv; *ib.* xlvi, citing Gütterbock.

<sup>2</sup> Bracton, fol. 137, *et haec est constitutio antiqua, in quo casu non est opus alia probatione*; cited by Maitland at Br. N. B. ii., case 138, — a neat case of the sort, in 1222, where it is adjudged *non potest defendere, suspendatur*. See also the Statute of Wales, s. xiv. (St. Realm, i. 68, A. D. 1284). This sort of thing is indigenous among all barbarous people; see Maine's *Anc. Law*, c. 10; *Anglo-Saxon Laws*, *passim*. It is the parent of a certain modern "presumption," on finding one in possession of stolen goods. *Harv. L. Rev.* iii. 157-8.

and that there is no good thing in his favor; accordingly it is adjudged, "*convictus est, ideo*, etc.," i.e., he is to be hanged. In 1226 (*ib.* iii., case 1724), Henry le Dreys is appealed by an approver in whose company he had been taken. He is not in frank-pledge, and has no lord to vouch for him, and does not offer in any way to purge himself,<sup>1</sup> *et ideo suspendatur*, etc.

There was irregularity and looseness. In 1219 (Br. N. B. ii. 67), the itinerant justices are punished for hanging men without trial, who were not taken with the mainour, had not confessed, and apparently had not put themselves on a jury: they had carried the current practices too far, and applied them to persons who had indeed befriended a near relative who appeared to be a thief, and who, while not confessing, had not satisfactorily denied receiving the stolen goods. The twelve jurors of the hundred had been referred to, and had given them a bad name, had "heard say" that the stolen goods were divided on their land, etc. Whether by reason of this sort of loose practice, or the prevalence of old ideas, or for whatever reason, it seems to have become the rule that standing mute was not confession, and that the accused could not be put on his trial by a jury without his consent. Of course the matter might have been covered by an "assise." But it was not; on the contrary, towards the end of the century we find a remarkable statute which seems to recognize the doctrine that consent was necessary, and provides a punishment (*peine*) for refusal, of a nature to induce consent. The Statute of Westminster the First (3 Edw. I. c. 12) enacts, in 1275, that "Notorious felons, openly of ill fame,

<sup>1</sup> One is said to clear himself (*purgare se*) by a jury, in Br. N. B. ii., case 19; and so elsewhere. It is interesting to notice that our word "trial," and its family, are little used at this time, and the fact points to a very important difference between old and later conceptions. Let any one turn, for instance, to the index to the Parliament Rolls at "Trial," and verify the references. The usual phrases at the period now in question are *probatio*, *purgatio*, *defensio*; seldom or never *triatio*. In one form or another *triare* (French *trier*) may indeed be rarely seen in our earlier books, as, e.g., in Bracton, fol. 105 (say, A. D. 1259); Fleta, Book 4, c. 11, s. 4 and 5 (say, 1290), Britton, f. 12 (say 1291-2); and the Mirror, c. 3, s. 34 (early in the next century). In Y. B. 30 & 31 Edw. I. 528 (1302), it is said of challenges to several jurymen, *triebantur per residuos de duodecim*. The phrase grew common in this century. In 1353 (Parl. Rolls, i. 248, pl. 12) we read that if there be a plea between merchants before the Mayor of the Staple, *et sur ceo pur trier ent la verite enqueste ou proeve soit a prendre*, if both are foreigners *soit trie per estranges*, if both are denizens, *soit trie per denzeins*, etc.; and in 1382, the Stat. 6 R. II. st. 1, c. 6, provides that, *rei veritas . . . per inquisitionem trietur*. Everybody knows that in the sixteenth century, e.g., in the Abridgments, it was in as familiar use as it is to-day.

who will not put themselves on inquests for felonies with which they are charged before the justices at the king's suit, shall be put in strong and hard imprisonment (*en le prison forte et dure*) as refusing the common law of the land. But this is not to be understood of persons who are taken on light suspicion." This appears to be the first mention of what came to be known as the *peine forte et dure*.

Of the long continuance of this practice until its abolition in 1772 (St. 12 Geo. III. c. 20, s. 1), and the tardy adoption then, and in 1827 (Stat. 7 & 8 Geo. IV. c. 28), of Bracton's opinion and the method of the cases in 1221; and of the strange and barbarous variations upon this penalty brought about by judges' or jailers' authority, I need not say much. A few words may be interesting. I have given all the language of the statute. In Britton (about 1291-2), we find details which are not in the statute: "That they be barefooted, ungirt and bareheaded, in the worst place in the prison, upon the bare ground continually night and day, that they eat only bread made of barley or bran, and that they drink not, the day they eat, nor eat, the day they drink, nor drink anything but water, and (*il soint en fyrges*) that they be put in irons" (Nichols, i. 26-7). Fleta (lib. i. c. 34, s. 33), a book which the writer of Britton is supposed to have had in his hands, says nothing of putting in irons. In the middle of the next century it was found possible by a woman to live forty days under the penance (Pike, Hist. Crime, i. 211; 4 Bl. Com. 328); so that although a miracle is intimated, in saying of this woman that she lived "without food or drink," it has been supposed that they did not yet *press* the prisoners. But this is probably a mistake; the penance may have been varied in the case just referred to. Pressing appears to be mentioned in the "Mirror;" and in the Cornish iter of 1302 we find what appear to be two cases of this sort, and one or two other cases of the *graunt penance*, in which the full details are not given.<sup>1</sup> The penance is described in the case of John de Dorley and Sir Ralph Bloyho (p. 510) thus: "that he should be put in a house on the ground in his shirt, laden with as much iron as he could bear (*charge de tant de fer cum il poit porter*), and that he should have nothing to drink on the day when he had anything to eat, and that he should drink water which came neither from foun-

<sup>1</sup> Y. B. 30 & 31 Edw. I. 510. See also pp. 498, 502, 531.

tain nor river."<sup>1</sup> In 1406 (Y. B. 8 H. IV. 1, pl. 2), we find Gascoigne, by advice of all the justices, awarding the penalty with further details. Two appealed of robbery and "mute of malice, to delay their death," are to lie on the ground naked, save trowsers, to have put upon them as great a weight of iron as they can bear and more (*tant de ferr et pois come ils puissent porter et plus*), and to have for food only the poorest bread that can be found, and standing water from the place nearest to the jail, and these only on alternate days, bread only on one day, and only water on the next, — and so to lie till death. In 1474 (Y. B. 14 Edw. IV. 8, 17), on an appeal, the terms of the judgment are given: "Needham went to Newgate and asked judgment *in forma quae sequitur*. That the appellee be remanded to his prison . . . and be put in a cell, and be naked on the bare ground without litter or rushes, or cloth or anything, and shall lie there naked on his back, . . . his head and feet covered, and that one arm be drawn with a cord to one quarter of the cell, and the other to the other quarter, and that one foot be drawn to one quarter of the cell and the other to the other, and that on his body be put a piece of iron as much as he can bear, and more (*un p  ce de ferre tant come il poit suffre et port sur luy, et plus*), and the first day after, he shall have three morsels of barley bread without any drink, and the second day he shall thrice drink, without bread, as much as he can of water standing near the prison, and this shall be his diet until he be dead." At Newgate two centuries later, in 1662 (Kelyng, old ed. 27), they had made other changes. Kelyng, C. J., tells us that "George Harley, being indicted for robbery, refused to plead, and his two thumbs were tied together with whipcord that the pain of that might compel him to plead, and he was sent away so tied, and a minister persuaded to go to him to persuade him; and an hour after he was brought again and pleaded. And this was said to be the constant practice at Newgate." This method was sometimes accompanied by the press; at this period also a sharp stone or stake was placed under the prisoner's back. The tying with whipcord was kept up at Newgate at least as late as 1734.<sup>2</sup> At last came the abolition of

<sup>1</sup> Was the original notion that of making the "irons," into which the prisoner was put, heavy enough to keep him down?

<sup>2</sup> Pal. Com. ii. 189-191, Barrington, Obs. on Stat. (2d ed.) 61-66. As is well known there was a reason for enduring this horrid torture in the doctrine that one who was not

all this in 1772, and the adoption then and in 1827 of the rules that had been advocated and a little followed five centuries before.<sup>1</sup> It is impossible to review these facts and not agree with Palgrave when he says: "It is a singular proof of the want of attention to any general principles of legislation that a custom equally foolish and barbarous should have continued so long unaltered. And the subject is one, among others, which shows that the English law . . . must forfeit many of the encomiums . . . which have so long passed current amongst us."<sup>2</sup>

As regards the origin of these singular practices, I venture the conjecture that the *prison forte et dure* of the Stat. West. I. c. 12, in 1275, is to be understood by reference to what Palgrave calls the "temporary ordinance" (Com. i. 266) of the King's Council, in 1219, after the Lateran Council. The judges, as we have seen, were then ordered, as regards the worst cases, to imprison, — but not in such a way as to imperil life or limb, — *teneantur in prisona nostra et salvo custodiantur; ita quod non incurrant periculum vitæ et membrorum occasione prisonæ nostræ*.<sup>3</sup> The later statute seems to refer to this restraint, and to take it off. It is the bad cases also that this statute purports to deal with, "notorious felons and such as be openly of evil name;" and the order is, that if these persons will not put themselves on the inquest, *soient mises en la prison forte et dure*. Apart from the order of 1219, it was matter of course that those who, according to the ideas of the period, could not be tried without their own consent should still be kept in prison; and it is highly probable that, without any

formally adjudged guilty did not forfeit his lands. Mr. Pike's account (Hist. Crime, ii. 194-5; *ib.* 283-5) of Strangeways' sufferings in 1658, of Burnworth's, in 1726, under nearly four hundredweight, and of John Durant's case, in 1734, are horrible, but interesting.

<sup>1</sup> "For the more effectual proceeding against persons standing mute on their arraignment for felony or piracy . . . s. 1. If [he] shall stand mute or will not answer directly to the felony or piracy . . . [he] shall be convicted, etc. . . . The court shall thereupon award judgement and execution . . . as if . . . convicted by verdict or confession. . . ." (Stat. 12 Geo. III. c. 20) s. 1. "If any person, not having the privilege of peerage, being arraigned upon any indictment for treason, felony or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without any further form be deemed to put himself upon the country for trial. . . . s. 2. If any person, being arraigned for treason, felony, piracy or misdemeanor, shall stand mute of malice, or will not answer directly . . . it shall be lawful for the court . . . to order the proper officer to enter a plea of not guilty. . . ." (Stat. 7 & 8 Geo. IV. c. 28.)

<sup>2</sup> See also Sir J. F. Stephen's observations, in Hist. Cr. Law, i. 300.

<sup>3</sup> Rymer, Fœd. (old ed.) 228.

statute for it, some persuasions would be adopted to induce consent. It was so in Normandy, where the prisoner was put on short diet, and where the judges even authorized torture.<sup>1</sup> But the order of 1219 may well have operated as a restraint upon these endeavors. The Statute of 1275 seems to have changed this. Something might now be added to the old imprisonment, and the description of it is found only in these words, *forte et dure*<sup>2</sup> It is certain that not until after this statute do we hear of the "penance," and then we find it very soon. As might be expected, it varies from time to time. We hear nothing of pressing at first; but seem to find it as early as 1302, and, soon afterwards, this, with the whole matter of the "penance," is the subject of bitter complaint in the "Mirror," a book written in the first quarter of the fourteenth century. It is declared (c. 5, s. 1, pl. 54) an abuse to load (*charge*) a man with iron and put him in penance before he is attainted of felony. Again (c. 5, s. 4), the Statute West. I. is said to be abused in that the penance is pushed so far as to kill people without regard to their condition, when perhaps a man might acquit himself (*se purra per cas aider et acquiter*) otherwise than by the country; and he ought not to be punished till he has been attainted. This book (c. 1, s. 9) declares chargeable with homicide those who kill a man in prison, when he is adjudged to penance by excess of "*peine*."<sup>3</sup>

In entering now upon an effort to trace certain main feat-

<sup>1</sup> Brunner, Schw. 474; Pal. Com. ii. 190; *ib.* i. 268.

<sup>2</sup> For certain unlawful practices of sheriffs and jailers, in putting appellees of good fame *en vile et dure prisonne*, see Stat. 5 Edw. II. c. 34 (1311).

<sup>3</sup> Palgrave (Com. ii. 189) cites a statement of 1293, in the "Chronicle" of the Priory of Dunstable (ii. 609): *Eodem anno justiciarii itinerantes apud Eboracum valde rigide se gerebant; et quendam nobilem . . . de multis felonis arrestatum ad poenitentiam statuti posuerunt, quia vere dictum patriae recusavit; et mortuus est in prisona*. Immediately after this a great robbery is mentioned, for which some knights and gentlemen were hanged; *quidam autem eligentes poenitentiam secundum statutum miserabiliter defecerunt*. It will be noticed that the Chronicler refers the penance to the statute. And so the "Mirror" Palgrave (Com. ii. 189) says that at about the period of the "Mirror" the chroniclers "record the fate of many criminals who perished under the infliction." It should be mentioned that Palgrave, in saying that *Bracton* describes the penance, doubtless suffers from a misprint; it should read *Britton*. *Bracton* does not mention it.

I ought at least to refer to the fact that Coke (2d Inst. 179) and Hale (Pl. Cr. ii. 321-2, mention weighty considerations in support of their opinion that the *peine forte et dure* existed before the statute. What I have said would indicate that in a sense this may be so, but not in their sense.

ures of the jury as they appear in several successive centuries, we shall probably find that the matters calling for attention will mainly arrange themselves under two heads: (1) The methods of informing the jury and improving their quality as a body of witnesses whose answers "tried" the case; and (2) the methods of controlling the jury, of preventing improper influence over them, of punishing and checking them, and of reviewing their action. It is these things that have originated or shaped much in our law, and, among other things, our singular "law of evidence."

*James B. Thayer.*

CAMBRIDGE.

[*To be continued.*]

## RESTRICTIONS UPON THE USE OF LAND.

---

A RESTRICTION may be defined as an agreement concerning the use of land by its owner which runs with the land in equity. Strictly speaking, restrictions did not exist till about 1840, for not till that time was the distinctive quality, that of running with the land, recognized. Long before this, however, covenants that to-day would be called restrictions had been enforced in equity; but the suits, being between the contracting parties, had raised only the ordinary questions of specific performance of contracts.<sup>1</sup> When first suit was brought against a purchaser of the land from the covenantor, the question was still treated as one of specific performance.<sup>2</sup> The inquiry was made whether the covenant ran with the land at law. If it ran, then the purchaser was subject to a legal obligation, which equity might specifically enforce. If not, then there was no obligation, either at law or in equity.

In neither of the two cases referred to were these points fairly in issue. As dicta, the opinions were unfavorably received by the profession,<sup>3</sup> and shortly afterwards discredited by actual decisions. In *Whatman v. Gibson*<sup>4</sup> a covenant against certain trades was enforced by injunction against a purchaser of the land with notice of the covenant, the court merely remarking that it "saw no difficulty" in so doing. In *Mann v. Stephens*<sup>5</sup> a covenant against building was enforced under similar circumstances, and with equal brevity. *Tulk v. Moxhay*<sup>6</sup> contains the first discussion of the principle upon which the court proceeds. That was a case upon a covenant by a former owner of land to maintain a garden. An injunction was granted against the erection of houses. Cottenham, L. C., says: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing part of it, that the latter shall either use or

<sup>1</sup> *Barret v. Blagrove*, 5 Ves. 555; *Macher v. Foundling Hospital*, 1 Ves. & B. 188; *Rankin v. Huskisson*, 4 Sim. 12; *Old Steyne's Case*, 2 Sugd. Vend. (10th ed.) 500.

<sup>2</sup> *Duke of Bedford v. British Museum*, 2 M. & K. 552; *Keppel v. Bailey*, 2 M. & K. 517.

<sup>3</sup> Sugden, Vend. (10th ed.) 492.

<sup>4</sup> 9 Sim. 196.

<sup>5</sup> 15 Sim. 379.

<sup>6</sup> 2 Phill. 774.



abstain from using the land purchased in a particular way, is what I never knew disputed. . . . It is said that the covenant, being one which does not run with the land, this court cannot enforce it ; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. . . . If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

In the leading cases in other jurisdictions, this same principle is laid down : the purchaser is bound because it is inequitable that he should escape liability, and this injustice exists either because he buys with notice,<sup>1</sup> or takes the land without giving value.<sup>2</sup>

To put it technically, the purchaser is bound by the ordinary principles of constructive trusts, precisely as a purchaser of land from one who has previously contracted to sell it is bound by the contract. To raise such a constructive trust, it is essential (1) that there shall be a contract concerning the use of land ; (2) that it shall be one which equity can specifically enforce ; (3) that the intention shall be that the contract shall run with the land. Under such contract, the promisor incurs an equitable as well as a legal obligation. The equitable obligation ceases when he parts with the land, for the contract has reference to acts of the owner of the land, and a decree for performance, if at all, must be against the owner for the time being. That is, the equitable obligation binds the promisor not personally, but in respect of his ownership of the land. The equity is attached to the land in the same way that any trust is attached, and will follow the land until it comes into the hands of a *bona fide* purchaser.<sup>3</sup> Against the original owner of the land, a restriction is a question of specific performance of a contract : against a subsequent purchaser, the question is one of trusts.

Although these principles are clearly recognized in the early cases, the courts of recent times have fallen into singularly con-

---

<sup>1</sup> *Whitney v. Union Ry. Co.*, 11 Gray, 359, at 364; *Marshall v. Brewer*, 19 N. J. Eq. 537, at 543; *Barrows v. Richards*, 8 Paige, 351.

<sup>2</sup> *Wolfe v. Frost*, 4 Sand. Ch. 72, at 88.

<sup>3</sup> *Prof. Langdell* in 1 Harv. L. Rev. 65; *Prof. Ames*, 1 Harv. L. Rev. 3.

fused notions of restrictions. In *L. & N. W. Ry. Co. v. Gomme*,<sup>1</sup> Jessel, M. R., says, "This is an equitable doctrine establishing an exception to the rules of common law, which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on an analogy to a covenant running with the land, or an analogy to an easement." And similar statements are found in other jurisdictions.<sup>2</sup> It seems to the writer that the two analogies suggested above are entirely misleading. The distinctions between restrictions and covenants running with the land are numerous and radical. A covenant must of course be under seal: a restriction may be created by simple contract.<sup>3</sup> Any kind of an agreement, affirmative or negative, is binding by way of a covenant: as will be noticed hereafter, restrictions are practically limited to negative agreements. Again, the question whether a covenant runs with the land at law depends on questions of privity of estate between the contracting parties: equity takes no cognizance of such questions. But given this privity, a covenant runs regardless of notice to the purchaser, while notice is essential in case of a restriction.

The analogy between a restriction and an easement is more striking, and has been adopted as the deciding principle in numerous cases. According to this view, restrictions grew out of the limitation upon easements. Easements are restricted to a few subjects, such as rights of way, support, etc.; the need was felt of a right that should cover a wider range, and equity invented that right. This view treats a restriction as a right, purely equitable, yet distinct from all other branches of equity jurisdiction, proceeding on the analogy to easements, borrowing its rules from the law of easements and adapting them to suit the procedure in equity. It assumes that the decisions in *Whatman v. Gibson* and *Tulk v. Moxhay* were pieces of judicial legislation, although the judges had no idea they were doing more than applying established rules of equity. Such a theory will not be accepted, if any other explanation can be offered. If it be true, a restriction is an anomaly. When a new case presents itself, a lawyer cannot turn for precedents to other branches of equity jurisdiction. He must see what legal rule is most analogous, and guess whether a court of equity

<sup>1</sup> 20 Chan. Div. 583.

<sup>2</sup> *Norcross v. James*, 140 Mass. 188, at 193; *Columbia Coll. v. Lynch*, 70 N. Y. 440, at 447.

<sup>3</sup> *Tulk v. Moxhay*, 2 Phil., at 778.

will adopt that rule, or reject it. Again, upon this view principles of restrictions would apply only to real estate. It would seem, however, that restrictive covenants concerning personal property will be enforced against purchasers with notice, when the property is of peculiar value.<sup>1</sup>

There is one other possible meaning of the term "equitable easement." A restriction is analogous to an easement in the same way that a *cestui que trust* resembles the owner of land, or a pledge of title deeds a mortgage. It may be said that there are equitable easements, in the same sense as there is equitable ownership or an equitable mortgage; all are forms of trusts. This view is consistent with the theory of *Tulk v. Moxhay*, and reconciles it to the apparently inconsistent statements in some later opinions. That theory so completely explains the actual decisions that I shall assume it to be correct.

This theory presents two sets of questions: first, regarding the creation of a restriction, which is decided upon principles of specific performance of a contract; secondly, the question whether it runs with the land, which is decided upon principles of constructive trusts. As to the first point, it is clear that there must be a binding contract; but no formalities are necessary. A restriction may be imposed by covenant,—the ordinary case,—or by simple contract,<sup>2</sup> or by contract implied from the acceptance of a deed containing a stipulation by words of reservation,<sup>3</sup> proviso,<sup>4</sup> or condition.<sup>5</sup> The fact that a different remedy, *i.e.*, forfeiture of the estate, is attached to a condition does not prevent the implication of a promise not to do the act forbidden.<sup>6</sup> A restriction may be implied from acts of the parties, such as reference to plans showing a scheme of restrictions,<sup>7</sup> or representations of the owner.<sup>8</sup> But the evidence of an intention to create a restriction must be very clear, and mere reference to a building scheme will not compel the owner to abide by its provisions without change.<sup>9</sup>

<sup>1</sup> *De Matteos v. Gibson*, 4 De G. & J. 276; *Clarke v. Hint*, 22 Pick. 231.

<sup>2</sup> *Dorr v. Harrigan*, 101 Mass. 531.

<sup>3</sup> *Peck v. Conway*, 119 Mass. 546.

<sup>4</sup> *Jeffries v. Jeffries*, 117 Mass. 183.

<sup>5</sup> *Parker v. Nightingale*, 6 All. 341; *Ayling v. Kramer*, 133 Mass. 12.

<sup>6</sup> 3 *Parsons on Cont.* (6th ed.) 356; *Logan v. Wienholt*, 1 Cl. & Fin. 611; *Plunkett v. M. E. Soc.*, 3 Cush. 561.

<sup>7</sup> *Mackenzie v. Childers*, 43 Chan. Div. 265.

<sup>8</sup> *Piggott v. Stratton*, 1 De G., F. & J. 33.

<sup>9</sup> *Light v. Goddard*, 11 All. 58; *Squire v. Campbell*, 1 My. & Cr. 459.

The contract creates an equitable interest in land, and is within the Statute of Frauds.<sup>1</sup> If it is not in writing it will not be enforced unless there has been part performance, or expenditure of money on the faith of it, sufficient to create an estoppel.<sup>2</sup> In Browne on the Statute of Frauds (4th ed.), § 269, the contrary statement is made; but the cases cited are not about restrictions, but personal contracts, or contracts concerning boundaries. There is, however, a distinction between a restriction and an ordinary trust in regard to the Statute of Frauds. In case of a trust, the name of the *cestui* must be in the written instrument. This is because the gist of the trust is the payment of the trust fund to the *cestui*, and the trust is wholly uncertain unless his name appears. The gist of a restriction is the doing or not doing certain acts to certain land. If the acts and the land are stated in writing, the court considers the statute satisfied, and will gather the other terms of the restriction by reading the writing as a whole in the light of surrounding circumstances. For this reason it is unnecessary that the writing should state to whom the benefit of the restriction shall accrue, whether to the covenantor personally or in favor of some other parcel of land. "This is a question of fact to be determined by the intention of the vendor, and that question must be determined upon the same rules of evidence as any other question of intention."<sup>3</sup> The ownership and character of buildings in the neighborhood,<sup>4</sup> plans,<sup>5</sup> building schemes,<sup>6</sup> the existence of similar restrictions upon other lots,<sup>7</sup> even parol agreements among neighbors,<sup>8</sup> may be shown as bearing upon the probable intention of the contracting parties.

It is generally stated that restrictions, as the name implies, are limited to agreements of a negative character.<sup>9</sup> This is not strictly true. Any agreement that equity will enforce between the contracting parties will equally be enforced as a restriction against a purchaser of the land. Equity decrees performance of a contract only where it can properly carry out its decree. It

<sup>1</sup> *Hubbell v. Warren*, 8 All. 173; *Wolfe v. Fiske*, 4 Sand. Ch. 72; *Rice v. Roberts*, 24 Wis. 461.

<sup>2</sup> *Wolfe v. Fiske*, *supra*.

<sup>3</sup> *Lord Esher in Nottingham Brick Works v. Butler*, 16 Q. B. D. 778, at 784.

<sup>4</sup> *Spicer v. Martin*, 14 Aff. Cas. 12, at 25.

<sup>5</sup> *Collins v. Castle*, 36 Chan. Div. 243, at 251-2.

<sup>6</sup> *Nottingham Brick Works v. Butler*, *supra*.

<sup>7</sup> *Childs v. Douglass, Kay*, 560.

<sup>8</sup> *Parker v. Nightingale*, 6 All. 341.

<sup>9</sup> *Heywood v. Brunswick Bldg. Soc.*, 8 Q. B. D. 403.

enforces contracts of giving, because performance is a simple matter; but a restriction, from the nature of the case, rarely falls within this class. The only case is *Morland v. Cook*,<sup>1</sup> where the agreement was to contribute toward the maintenance of a sea wall. Equity will always take jurisdiction over negative contracts, for the remedy is simple, — an injunction restraining the forbidden act, or a mandatory injunction to undo what has been done in breach of the agreement. Practically all restrictions belong to this class. Equity will not decree specific performance of affirmative contracts that call for the exercise of skill, discretion, or good faith; but when the required acts are of a simple nature it seems that the court will take jurisdiction. It has enforced contracts to keep in repair the stop-gate of a canal,<sup>2</sup> to construct an archway,<sup>3</sup> to lay a railway track over certain land,<sup>4</sup> and to maintain a switch.<sup>5</sup> In *Cooke v. Chilcoat*<sup>6</sup> a covenant to supply adjacent land with water was enforced, although it necessitated laying pipes and erecting machinery. This undoubtedly goes too far, and has since been overruled.

In some cases where the intention of the parties can be substantially carried out, a contract to do affirmative acts will be held to imply an agreement not to do certain acts inconsistent with the main agreement, and the doing of these acts will be restrained by injunction.<sup>7</sup> Thus a contract to lay out land as a garden has been enforced by enjoining the erection of houses,<sup>8</sup> and where there was a covenant to buy beer of the covenantee for use in a public house a subsequent purchaser of the house was enjoined from buying of any one else.<sup>9</sup>

Restrictions are also subject to the general rule that equity will not enforce a contract where it would work hardship or injustice. A plaintiff has no standing in court unless he has been diligent in pressing his claim. He is held to have waived his right if he has allowed the defendant to make expenditures in breach of the restriction without objection,<sup>10</sup> or if he has acquiesced in a breach

<sup>1</sup> L. R. 6 Eq. 252.

<sup>2</sup> *Lane v. Newdigate*, 10 Ves. 192.

<sup>3</sup> *Storer v. G. W. Ry. Co.*, 2 Y. & C. C. 48.

<sup>4</sup> *Wilson v. Furness Ry. Co.*, L. R. 9 Eq. 25.

<sup>5</sup> *Lydick v. B. & O. R. Co.*, 17 W. Va. 427.

<sup>6</sup> 3 Chan. Div. 694.

<sup>7</sup> *Lumley v. Wagner*, 1 De G., M. & G. 616.

<sup>8</sup> *Rankin v. Huskisson*, 4 Sim. 12; *Tulk v. Moxhay*, 2 Phil. 774.

<sup>9</sup> *Luke v. Dennis*, 7 Chan. Div. 227; *Colt v. Tourle*, L. R. 4 Chan. 654.

<sup>10</sup> *Eastwood v. Lever*, 4 De G., J. & S. 118.

for an unreasonable time ; but his acquiescence in a minor breach is not a waiver of the whole restriction.<sup>1</sup> For example, acquiescence in the maintenance of a low building does not permit the erection of a higher structure ;<sup>2</sup> nor does acquiescence in a small stable waive objections to one intended for use by a street railway.<sup>3</sup>

When similar restrictions are placed on a number of lots, the release of the restrictions as to some lots will release them as to all, if the general scheme of improvement has been materially affected by the partial releases,<sup>4</sup> but otherwise if the releases do not detract from the value of the remaining restrictions.<sup>5</sup> This rule is part of a broad principle that equity will not interfere where, on account of changed conditions, a restriction no longer accomplishes the purpose for which it was designed — that is, where its usefulness is gone, though the burden still remains. In the British Museum case<sup>6</sup> a restriction was imposed for the benefit of land occupied by a palace and a park ; the land was subsequently cut up into small lots and covered with buildings, and it was held that the restriction was gone. So when a restriction against trades is intended to improve a neighborhood as a residential quarter and the neighborhood has lost that character, the restriction will not be enforced.<sup>7</sup>

In no case will a restriction be enforced unless it is of value commensurate with the burden. But it is unnecessary to show that the particular breach which it is sought to enjoin will cause substantial damage ;<sup>8</sup> provided the restriction has some substantial value, any breach will be enjoined unless so trivial as to come within the principle *de minimis*.<sup>9</sup>

The third essential of a restriction, as has been stated, is the intention that it should bind future owners of the land. This is always an ordinary question of construction ; no words of limitation, no mention of " assigns," are necessary.<sup>10</sup> There are two cases,

<sup>1</sup> *Richards v. Revitt*, 7 Chan. Div. 224.      <sup>2</sup> *Gaskin v. Balls*, 13 Chan. Div. 324.

<sup>3</sup> *Whitney v. Union St. Rwy.*, 11 Gray, 359.

<sup>4</sup> *Peck v. Williams*, L. R. 3 Eq. 15; *Williams v. Roper, Turn. & R.* 18.

<sup>5</sup> *Macher v. Foundling Hosp.*, 1 Ves. & B. 188; *German v. Chapman*, 7 Chan. Div. 271.      <sup>6</sup> 2 My. & K. 552.

<sup>7</sup> *Sayers v. Collyer*, 24 Chan. Div. 180; *Thacher v. Columbia Coll.*, 87 N. Y. 311.

<sup>8</sup> *Mannus v. Johnson*, 1 Chan. Div. 673; *Tipping v. Eckersley*, 2 K. & J. 264, at 270.

<sup>9</sup> *Att. Gen. v. Algonquin Club*, 153 Mass. 447.

<sup>10</sup> *Wilkinson v. Rogers*, 10 Jur. N. s., 792; *Hodges v. Sloan*, 107 N. Y. 244.

however, that are apparently inconsistent.<sup>1</sup> It has been held that when part of a quarry or a clay pit was sold with a covenant that no stone or clay should be sold therefrom, such covenant was personal and did not run with the land. In both cases the intention of the parties seems clearly to have been that both the benefit and burden of the contract should adhere to the land; and the decisions must be supported upon the ground that the contracts were illegal because designed to create a monopoly. In a New York case a view was taken contrary to that of the two cases cited.<sup>2</sup>

Given a valid contract, intended to run with the land, such as equity has the power to enforce, the question becomes one of constructive trust. Such a contract is binding upon one who takes as volunteer,<sup>3</sup> or with notice, unless there has been a mesne conveyance to a purchaser for value without notice.<sup>4</sup> The notice may be actual or constructive. In the United States, the registry system supplies constructive notice. Aside from this, a purchaser is bound by notice of everything that appears in his title-deeds,<sup>5</sup> or from the character of the land in the neighborhood, as when all the houses in a block are built upon some uniform plan.<sup>6</sup> The law is not clear upon the point how far one having notice of a restriction is bound to find out from extrinsic evidence for whose benefit the restriction was intended. In *Parker v. Nightingale*<sup>7</sup> a purchaser was held to notice of the fact that his land had been part of a partition between tenants in common, and that there had been a parol agreement among them concerning restrictions. The rule seems to be that a purchaser who knows of the restriction is bound to notice of all facts aiding in its construction which the exercise of reasonable diligence would disclose.

The question who may enforce the restriction is, perhaps, the most important part of the subject. There are three possibilities: the restriction may be for the benefit of the promisee personally, of other land of his, or of somebody's else land. The question is determined according to the intention of the parties. Most

<sup>1</sup> *Norcross v. James*, 140 Mass. 188; *Brewer v. Marshall*, 19 N. J. Eq. 537.

<sup>2</sup> *Hodges v. Sloan*, 107 N. Y. 224.

<sup>3</sup> *Wolfe v. Frost*, 54 Sand. Ch. 72; *Toll Br. Co. v. Vreeland*, 4 N. J. Eq. 157.

<sup>4</sup> *Nottingham Brick Works v. Butler*, 16 Q. B. D. 778.

<sup>5</sup> *Wilson v. Hart*, L. R. 1 Chan. 463.

<sup>6</sup> *Spicer v. Martin*, 14 App. Cas. 12.

<sup>7</sup> 6 All. 341.

frequently extrinsic evidence is necessary to explain the written instrument upon this point, and when this is done certain rules of construction are applied. The instrument is construed so as to make the burden of the restriction as light as possible, and the right is held personal to the promisee unless the contrary intention clearly appears.<sup>1</sup> If, however, the adjoining land belongs to the promisee, and is benefited by the restriction, there is a presumption that it was intended to be appurtenant to that land,<sup>2</sup> particularly if there is any uniform scheme regarding the two lots, or reference to plans.<sup>3</sup> If this intention be manifest, equity has no difficulty in carrying it into effect: it presumes an assignment of the restriction by the owner when he sells the land to which it is attached, and an acceptance by the purchaser, whether he knows of the restriction or not.<sup>4</sup>

When the intention is that the restriction shall inure to the benefit of land not owned by the covenantee, a stricter construction still is demanded. The case usually arises when the owner of land divides it into building lots according to some scheme of improvement; he sells the lots at different times, placing restrictions upon them according to this scheme. It is evident that any particular restriction inures to the benefit of lots remaining unsold in the hands of the grantor; but can it be made appurtenant to lots sold previously? At the time the restriction is imposed, the grantor and the prior purchaser of lots are strangers; can the grantor donate the benefit of the restriction under such circumstances to a stranger? It is held that he can,<sup>5</sup> and rightly, it would seem; for there is never any objection to making a contract for the benefit of another, and a restriction is only a contract. But the courts are properly cautious in giving effect to such a transaction.

It makes little difference whether a restriction is personal to the covenantee or appurtenant to his land, but if it can be made

---

<sup>1</sup> *Badger v. Boardman*, 16 Gray, 559; *Lowell Inst. for Sav. v. Lowell*, 153 Mass. 530; *Masters v. Hansard*, 4 Chan. Div. 718; *Keats v. Lyon*, 4 Chan. App. 218.

<sup>2</sup> *Renals v. Cowlinshaw*, 9 Chan. Div. 125; *Peck v. Conway*, 119 Mass. 546.

<sup>3</sup> *Childs v. Douglass*, Kay, 1; *Tobey v. Moore*, 130 Mass. 448.

<sup>4</sup> *Patching v. Dubbins*, Kay, 560.

<sup>5</sup> *Collins v. Castle*, 36 Chan. Div. 243; *Spicer v. Martin*, 14 App. Cas. 12; *Nottingham Brick Works v. Butler*, 16 Q. B. D. 778; *Parker v. Nightingale*, 6 All. 341; *Jeffries v. Jeffries*, 117 Mass. 188; *Payson v. Burnham*, 141 Mass. 547; *Hamlin v. Werner*, 144 Mass. 396; *Barrows v. Richards*, 8 Paige, 351.



appurtenant to neighboring land the burden may be indefinitely increased. When the intention is collected from extrinsic evidence, it must appear with extreme clearness just what land is to have the benefit. At one time it was felt that the land seeking to enforce a restriction must itself be subject to a reciprocal covenant in favor of the other lot; but this is no longer necessary.<sup>1</sup> The language of a late opinion<sup>2</sup> would lay down the rule that a prior purchaser can sue a subsequent purchaser of part of a building estate only when there had been, from plans, representations, or mode of sale, an implied agreement by the common vendor with the earlier purchaser that any restriction subsequently imposed shall inure to his benefit—that is, the vendor cannot give the benefit of the restriction away, but may sell it. It is hardly to be supposed that any such limitation will be kept. The true rule probably is that there must be some very strong evidence, like the existence of a building scheme, mutual covenants, or express statements by the vendor as to the subsequent restrictions, before the court will construe the restriction as appurtenant of the lots previously sold. But when the intention is manifest in the writing itself, there is no objection to giving effect to it.<sup>3</sup>

It has been suggested that these cases might be explained upon other grounds. The vendor, it is said, who puts up lots for sale according to a building scheme impliedly covenants with the purchaser of the first lot that all the remaining lots shall be subject to the restrictions noted in the scheme, and that this covenant is binding upon subsequent purchasers of lots. There are three objections to this. We have seen that a court is extremely reluctant to imply restrictions from such transactions; the restrictions, if implied, would rest upon acts of which subsequent purchasers would probably have no notice; moreover, the cases do not state whether the purchasers had notice, and the opinions contain no inquiry upon this point. The court in each case professes to enforce the express covenant of the subsequent purchaser, and not the implied covenant (if any) of the vendor.

Both benefit and burden of a restriction may be apportioned. When land to which a restriction is appurtenant is divided the

---

<sup>1</sup> *Collins v. Castle*, 36 Chan. Div. 243.

<sup>2</sup> *Hall, V. C.*, in *Renals v. Cowlinshaw*, 9 Chan. Div., at 129.

<sup>3</sup> *Barrows v. Richards*, 8 Paige, 351.

benefit follows each lot,<sup>1</sup> and the same is true of the burden; but when part of land subject to a restriction is sold, one part cannot claim the benefit of the restriction over the other.<sup>2</sup>

As has been said, the theory upon which equity makes the restriction run with the land is by an implied assignment of the contract. The original parties to the contract upon parting with the land cease to have any real interest. The real parties in interest, the owners of the dominant<sup>3</sup> and servient<sup>4</sup> tenements, may bring suit and be sued without joining their predecessors in title; and when a restriction inures for the benefit of several lots, the owner of one may bring suit without joining the other owners.<sup>5</sup>

The whole subject of restrictions is still in its infancy. Outside England, Massachusetts, and New York, the cases are few, and even in those three jurisdictions the questions uncovered by decisions are not very numerous. Such cases as do exist seem, however, completely to establish this proposition. Fresh questions, as they arise, are to be solved by answering one or both of these questions: (1) as against the party creating the restriction, is there a case for the specific performance of the contract? (2) as against subsequent purchasers of the land, do the circumstances of his purchase give rise to a constructive trust?

*Charles I. Giddings.*

---

<sup>1</sup> *Schworer v. Boylston Market Ass.*, 99 Mass. 285.

<sup>2</sup> *Jewell v. Lee*, 14 All. 145; *King v. Dickinson*, 40 Chan. Div. 596.

<sup>3</sup> *Nottingham Brick Works v. Butler*, 16 Q. B. D. 778, at 784; *Schworer v. Boylston Market Ass.*, *supra*.

<sup>4</sup> *Hall v. Ewin*, 37 Chan. Div. 80.

<sup>5</sup> *Western v. M'Dermott*, L. R. 2 Chan. 72; *Harrison v. Goode*, L. R. 11 Eq. 349.

# HARVARD LAW REVIEW.

---

Published Monthly, during the Academic Year, by Harvard Law Students.

---

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

---

## *Editorial Board.*

OLIVER PRESCOTT, JR., . . . . . *Editor-in-Chief.*

PHILIP S. ABBOT, *Treasurer*,  
ALBERT S. BARD,  
NORMAN HAPGOOD,  
CARLETON HUNNEMAN,  
FREDERICK B. JACOBS,  
JAMES G. KING,  
PHILIP WARDNER,

RICHMOND O. AULICK,  
ALBERT E. HADLOCK,  
HENRY HUDSON,  
J. WRIGHT HUNT,  
M. DAY KIMBALL,  
JAMES M. NEWELL,  
CHARLES WARREN,

GEORGE E. WRIGHT.

---

**JURY'S DUTY IN CRIMINAL CASES.** — The case of *Com. v. McManus*, recently decided by the Supreme Court of Pennsylvania, (21 Atl. Rep. 1018 and 22 Atl. Rep. 761) contains an interesting discussion of the proposition that the jury are judges both of law and fact in criminal cases. The case came up on exception to a ruling of the trial judge, refusing to direct the jury that they were the judges of law and fact. On this point the judge ruled that the jury were bound to decide the case on the law and the evidence; that the court's statement of law was the best evidence of the law which the jury had, and therefore in view of that evidence, and viewing it as evidence only, the jury must be guided by what the court said was the law. This ruling was affirmed by the Supreme Court, Paxson, C. J., saying that the charge of the court was the best evidence of the law within the jury's reach, and therefore the jury were bound to follow it. Mitchell, J., in his opinion, denies emphatically that the jury are the judges of law as well as of fact. He says that the doctrine arose from the power of the jury to give general verdicts, which, if in favor of acquittal, could not be revised by the court. But to prove the doctrine true, a court should have no power of revision when the verdict was against the prisoner. This right of revision by the court has never been disputed, and conclusively negatives the jury's right to be judges of the law.

It would seem that Mitchell, J.'s, view is correct and his reasoning conclusive. There is always danger, as was pointed out by the court of Georgia in *Higginbotham v. Campbell* (11 S. E. Rep. 1027), that if the jury are told that they are judges of law as well as of fact, they may think themselves not bound to accept the court's statement of law, any more than they are bound to believe a witness to a fact.

**NATURE OF THE RIGHTS IN A DEAD BODY — DAMAGES FOR MENTAL SUFFERING.** — An interesting and in some ways helpful opinion was delivered last month in Minnesota, on the confused subject of damages for mental suffering caused by mutilation of a corpse.<sup>1</sup> The action was brought by a widow for the unlawful dissection of the body of her

---

<sup>1</sup> *Larson v. Chase*, 50 N. W. Rep. 238 (Minn. 189.)

deceased husband, and the only damage alleged was the mental anguish and the nervous shock. The demurrer, argued on the ground that the widow had no property and no legal interest in the corpse, and that the mental suffering was no ground of action, was overruled, and the decision is supported on appeal. The common-law doctrine, that no one had any rights in a dead body, has now been, says Judge Mitchell, thoroughly repudiated by the American courts, whose lack of ecclesiastical law left the temporal courts the sole protectors of the dead, and of the interest of the living in their dead. The whole subject is much confused by the technical discussion as to whether a corpse is property in the commercial sense, and, as the court points out, the discussion of that question is entirely unnecessary to the decision of this. The important fact is that the nearest family representative has a legal right to the body for the purpose of burial, and the disturbance of that right, like the disturbance of any other right recognized by the law, is a subject for compensation.

Having stated thus broadly the cause of action, the court points out that the confusion on the subject of damages grows out of the common error of failing to distinguish an element of damage from a cause of action, as is shown by the frequent misuse of the leading case of *Lynch v. Knight*, which is well discussed by Judge Mitchell. Once given your cause of action, damages cover much that, standing alone, would form no ground of recovery.

In thus making the right infringed a branch of the right to undisturbed family relations, and so avoiding the vexed question of property, and in supporting it by reference to cases where substantial damages have been given for an assault without physical contact, and for false imprisonment without contact, to which might be added the case of recovery by a husband for an attack on his wife where there was no loss of service, the court follows directly the line of argument used in the discussion of the growth in this branch of the law in the last edition of Sedgwick on Damages. Certainly it is a more satisfactory explanation of a right that every one feels must exist; and, as the court says, it is much more satisfactory to our common sense, as well as to our feelings, to base the recovery on a right connected directly with the real and substantial wrong than on a technical and dimly understood right of property.

---

POLITICAL ASSESSMENTS. — The *United States v. Newton*, a case interesting from its bearing on the civil-service reform question, has lately been decided in the Supreme Court of the District of Columbia. The defendant was indicted under section 12 of the Civil-Service Act, which provides in effect that no one shall solicit or receive any contribution for political purposes in any room or building occupied in the discharge of official duties by any officer or employé of the United States. The defendant had sent letters to various persons in government buildings, referring to the State campaign in Virginia, requesting such persons to join the Republican Club and "to make such further contribution as your means will permit." The indictment did not allege that the persons solicited were government employés. On this ground the defendant demurred, and also argued that the act was unconstitutional, as infringing the rights of the citizen. The demurrer was overruled, the court saying that the right to forbid the levying of political assessments in public buildings was clearly within the power

of Congress. The court ruled also that the indictment was sufficient. Another section of the act mentioned particularly public employes. The fact that they were not mentioned in the section on which the indictment was based, the court said, was conclusive proof that the act was intended to apply to all persons who happened to be within public buildings, whether employed there or not. It was therefore immaterial to allege that the solicitation was made to government employes.

It might perhaps be suggested that Congress did not intend to protect mere strangers in the government buildings from annoyance, and that the omission to insert the words "government employes" in this section of the act was unintentional. Certainly the object for which the act was passed would be fully satisfied by that construction. In this case of course the demurrer should have succeeded, as the offence aimed at by the statute was not set out. The result reached, however, is eminently satisfactory from a practical standpoint, for it will give the greatest possible efficiency to a useful law.

**WEAVERS' FINES ACT DECLARED UNCONSTITUTIONAL.** — The recent decision<sup>1</sup> of the Supreme Court of Massachusetts declaring unconstitutional the "Weavers' Fines Act," passed by the State Legislature of 1891, is noteworthy, as giving a narrow interpretation of the constitutional power to make "all manner of wholesome and reasonable orders . . . not repugnant to the Constitution . . . for the good and welfare" of the public. The act in question is as follows: "No employer shall impose a fine upon or withhold the wages, or any part of the wages, of an employe engaged at weaving, for imperfections that may arise during the process of weaving." The view of the court is that the act is unconstitutional, in that it interferes with the inalienable right of "acquiring, possessing, and protecting property" guaranteed by the State Constitution, by restricting the necessarily incidental right to make reasonable contracts, and in that it impairs the obligation of contracts within the meaning of the Federal Constitution. The court admits that the Legislature, if it should "determine it to be for the best interests of the people that a certain class of employes should not be permitted to subject themselves to an arbitrary imposition of a fine or penalty by their employer, might pass a law to that effect." But they say, "When the attempt is to compel payment under a contract of the price for good work when only inferior work is done, a different question is presented." They find a practical argument in support of their view, in the fact that a suit for damages against the employe for breach of contract would in most cases be of no value to the employer.

Judge Holmes alone dissents from the opinion of the majority and holds the act constitutional. He denies that it in any way impairs the obligation of contracts, for the simple reason that its operation is prospective, and it can scarcely be said to impair the obligation of contracts made after its passage. Nor does it interfere with the right of "acquiring, possessing, and protecting property," any more than the laws against usury or gaming. It is a fair assumption that the act was passed to protect employes from being "often cheated out of a part of their wages under a false pretence that the work done was imperfect."

<sup>1</sup> *Com. v. Perry*, 28 N. E. Rep. 1126.

The view taken by Judge Holmes would seem to be the sounder and more liberal one. To the Legislature is confided the generous power to make such laws as it shall deem fit for the general welfare, subject, of course, to constitutional limitations. The Legislature surely may consider the fact that employers may possibly oppress their employes, treat them with injustice and severity, and arbitrarily or dishonestly withhold their wages. The large class employed in the manufacture of cloth cannot afford to be deprived of even a part of their money for any length of time. Surely it is a permissible view that the Legislature, determining it to be for the public interest, should use its power for the protection of this large class, and that, in fact, the act in question is a "wholesome and reasonable order for the good and welfare" of the public.

If the court interprets the statute as forbidding the making of reasonable contracts to pay what the work is worth—and that appears to be their interpretation—their admission that the Legislature might forbid the imposition of a fine or penalty by the employer weakens their position considerably. For if the Legislature may in the interests of the people forbid the direct imposition of a penalty, it is submitted that it may, with equal justification, forbid an indirect imposition by means of a contract to pay what the work is worth.

The act does not pretend to deprive employers of their remedy for imperfect work by action. They still have this remedy, even admitting that the statute in effect abolishes the right of recoupment and set-off—rights which the Legislature may constitutionally abolish. The fact that such remedy is practically worthless is, as Judge Holmes says, no less true, though for different reasons, where the employes' wages are unjustly detained. Furthermore, the practical worthlessness of the remedy is no argument against the constitutionality of the act.

The view of the majority would seem to be an extremely narrow one; as, however, the decision is against the constitutionality of State legislation, there is no chance of an appeal to the Supreme Court of the United States.<sup>1</sup>

LIBELLOUS TO CALL A MAN AN "ANARCHIST."—It may interest Mr. Walter Crane and others to know the opinion of the Illinois Supreme Court as to what charges are likely to bring a man into public hatred, contempt, or ridicule. The decisions of the appellate and circuit courts are reversed, on the ground that in charging the plaintiff with being an anarchist the *Chicago News* laid itself open to damages for libel. That a man may be brought into hatred, contempt, or ridicule by professing vicious, degrading, or absurd principles, says the court, seems too plain for argument; and in a community where anarchy is clearly seen to be no political creed or body of principles, but the enemy of all government and the natural foe of each good citizen, the courts will protect a man from being charged with fellowship in this unpleasant school of philosophy. Of course the definition of libel remains unchanged, but light is thrown on the social status of the anarchist.

<sup>1</sup> Compare *Turner v. Nye*, 28 N. E. Rep. 1048 (Nov. 11, 1891), where the Supreme Court of Massachusetts (Field, C. J., dissenting) held that the Stat. Mass. 1889, c. 383, providing that land might be flowed for the purpose of fish culture, was not unconstitutional, as authorizing the taking of private property for public use, but was within the police power of the State, and a pond stocked with trout, and maintained only for the profit and advantage of the owner, was held to be within the act.

**THE NEW YORK STATUTORY PROVISIONS FOR CRIMINAL APPEALS.** — In giving the opinion of the New York Court of Appeals, that the jury below were not only justified in finding, but forced by the evidence to find, the prisoner guilty of murder, Chief Justice Ruger frees his mind of its load of disgust with the Statute of 1887, which allows appeals in capital cases directly from the trial to the Court of Appeals, at the expense of the county, without reference to whether errors were committed at the trial or not. The statute simply invites the criminal to take a delay of many months, without reason, as without risk or expense, to see if the upper court can find any ground, not perceptible to counsel on either side, upon which to base a reversal of the jury's finding on questions of fact. The Court of Appeals may chafe at the absurdity, but the only course open to it is to waste its time and wonder at the weirdness of the New York law. Mercy is well, but the community has rights.

## RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the court. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

**AGENCY — MASTER AND SERVANT — DEFECTIVE APPLIANCES.** — It is not incumbent on a master who has caused a scaffold to be erected on which planks, suitable in quantity and quality, are laid to walk upon in the customary manner, without being fastened, to see to it that these planks are adjusted and in proper place at all times. The adjustment of such planks is incident to the service required of a servant who uses the same. *Jennings v. Iron Bay Co.*, 49 N. W. Rep. 685 (Minn.).

**AGENCY — MASTER AND SERVANT — DUTY TO PROVIDE SUITABLE APPLIANCES.** — The plaintiff was employed in the defendant's oil-mill. It was the duty of another servant to supply him, while working, with bags free from holes. The plaintiff was injured in consequence of receiving a defective bag. *Held*, that although the defendant had employed a person for the express purpose of repairing the bags, he is liable to the plaintiff for damages for an injury caused by the negligent performance of this work. *Bowen v. Carolina, C. G. & C. R. Co.*, 13 S. E. Rep. 419 (S. C.).

**BILLS AND NOTES — ANOMALOUS INDORSEMENTS.** — Where a party indorses a note before the payee of the note, such an indorsement has the effect of an ordinary indorsement, and the indorser is liable to the payee and subsequent holders, in the order in which he stands upon the note. *Spencer v. Allerton*, 22 Atl. Rep. 778 (Conn.).

Although based upon the construction of a statute, this case is interesting as putting aside the former Connecticut doctrine that such an indorser was a mere guarantor, and bringing the law of that State into harmony with the law merchant.

**BILLS AND NOTES — ANOMALOUS INDORSEMENT.** — *Held*, that the Illinois Supreme Court is fully committed to the doctrine that when a third party writes his name across the back of a promissory note, the presumption from the indorsement is that he assumed the liability of guarantor; yet parol evidence may be produced to prove what liability was in fact assumed. *Kingsland v. Koeppe*, 28 N. E. Rep. 48 (Ill.).

**BILLS AND NOTES — CONDITIONAL PAYMENT.** — The acceptance of a note "for," or "on account of," or "in payment of" an existing debt, in the absence of an express agreement or understanding that it is taken in satisfaction or discharge of the debt, is to be understood and interpreted as a conditional payment only. *Combination Steel and Iron Co. v. St. Paul City Ry. Co.*, 49 N. W. Rep. 744 (Minn.).

**BILLS AND NOTES — FORGED BILL — FICTITIOUS PAYEE — BILLS OF EXCHANGE ACT.** — The bills in question were entirely a forgery, except the acceptance, which was genuine, but procured by fraud. They were payable to the order of an existing person in whose favor the acceptor had often accepted similar genuine bills. But the bills in question were never delivered to the person named as payee, and the forger had not intended that they should be. The forger collected the amount of the bills from the bank of the acceptor upon a forged indorsement of the payee's name. The court held that the bank could charge its depositor with the amount so paid. The majority of the court reach this conclusion by the following steps: 1. The acceptor is estopped to deny that there are bills of exchange. 2. The Bills of Exchange Act provides that "where the payee is a fictitious or non-existent person," the bill may be treated as payable to bearer. A payee is fictitious, even though an existing person, if the drawer uses his name with no intention that payment shall be made to him. In order to treat a bill as payable to bearer as against the acceptor, it is not necessary under this statute that the acceptor should be aware of the non-existence of the payee. These bills were payable to bearer, and were therefore paid by the bank according to their tenor. *Bank of England v. Vagliano Brothers* [1891] A. C. 107.

**BILLS AND NOTES — LIABILITY OF SELLER — WARRANTY.** — The *bona fide* seller of negotiable bonds which are fraudulent reissues of genuine bonds is not liable to the purchaser on an implied warranty. *Meyer v. Richards*, 46 Fed. Rep. 727.

**COMMON CARRIERS — TAXABLE PROPERTY.** — A Michigan statute exempts all necessary buildings used by a railroad corporation for its passenger and freight business. *Held*, that a grain elevator owned and operated by such corporation is within the provisions of the statute, and is not subject to general taxation. "It is complainant's grain depot, used in the business of transportation, and only used as a warehouse in connection with its regular business as a common carrier." *Detroit Union R.R. Depot & Station Co. v. City of Detroit*, 50 N. W. Rep. 302 (Mich.).

**COMMON CARRIERS — TELEPHONE COMPANIES.** — The defendant, a telephone company, refused to furnish telephone instruments to the plaintiff, a telegraph company carrying on business in the same territory with defendant, unless the plaintiff agreed not to use the telephone in connection with the business of transmitting telegrams. The defendant was only a licensee, and the licensor, owner of all the patents on telephones, had agreed with a telegraph company, a rival of the plaintiff, to allow it the use of the telephones, but to deny this privilege to all other companies. *Held*, the telephone company is a common carrier, and must serve all persons alike. The contract with the rival telegraph company is void. *State v. Del. & A. Tel. & Tel. Co.*, 47 Fed. Rep. 633.

**CONSTITUTIONAL LAW — POLICE POWER — ELECTRIC WIRES.** — Where the evidence shows that the stretching of electric wires over and upon the roofs of buildings is extremely dangerous, both as being liable to originate fires and as obstructions to the extinguishment of fires otherwise originated, a city ordinance absolutely prohibiting the practice is a valid exercise of the police power. *Electric Co. v. San Francisco*, 45 Fed. Rep. 593.

**CONTRACT — HUSBAND AND WIFE — RESTRAINT OF MARRIAGE.** — A contract by which a husband agrees to pay his divorced wife \$45 a month for her support "for so long a time as she does not marry again" is not a restraint of marriage, nor in any wise against public policy. *Jones v. Jones*, 27 Pac. Rep. 85 (Col.).

**CONTRACT — INSURANCE — IMPUTATION OF KNOWLEDGE.** — Where a corporation organized to transport, store, and insure petroleum, whose custom it is to contract with its customers to insure the oil in its tanks at its own expense, procures insurance thereon without any written request or representation as to ownership, the insurers cannot escape liability on the ground that the assured did not own the oil, since the insurers are chargeable with knowledge of the nature of the business of the assured, and will be held to have assumed the risk of any loss which it might sustain by reason of fire. *Western & Atl. Pipe Lines v. Home Ins. Co.*, 22 Atl. Rep. 665 (Pa.).



**CORPORATIONS — BILL BY STOCKHOLDER AGAINST DIRECTORS — DEFECTIVE ALLEGATIONS.** — Bill seeks to restrain directors from doing certain illegal acts. It alleges, *inter alia*, that the defendants own a controlling interest in the stock and that protests have been made. It did not allege that such protests were made by or on behalf of the plaintiff or any other stockholder. Preliminary injunction refused, since it did not appear what particular efforts had been made by plaintiff to secure action by the directors, nor the causes of his failure to obtain relief from them. *Weidenfeld v. Allegheny & K. R. Co.*, 47 Fed. Rep. 11.

**CRIMINAL LAW BURGLARY — INTENT.** — Accused proposed to X to rob the store of M, X's father-in-law. X, with the connivance of M, consented, in order to secure the conviction of accused. After dark they went together to the store; X broke in; accused remained outside, took a piece of bacon that X handed out, and carried it off. *Held*, that these facts did not warrant a conviction of burglary. Accused was not guilty independently, because he did not himself enter; nor was he guilty as a principal in the second degree, because X, whom he was aiding, had no felonious intent. *State v. Hayes*, 16 S. W. Rep. 514 (Mo.).

**CRIMINAL LAW — INTOXICATING LIQUORS — DRUGGIST'S LICENSE.** — Under a statute declaring that the term "spirituos and intoxicating liquors" shall be held to include all "mixed liquors" and all "mixed liquor of which a part is spirituous and intoxicating," liquors spirituous and intoxicating do not lose their identity as such when compounded with drugs or chemicals for use as medicine, or in commerce or the arts. And the fact that an individual has been licensed as a druggist or pharmacist does not entitle him to use spirituous or intoxicating liquors in compounding the medicine which he sells, without first obtaining the proper license for the sale of spirituous and intoxicating liquors. *State v. Gray*, 22 Atl. Rep. 675 (Conn.).

**CRIMINAL LAW — JURISDICTION — OFFENCE INCLUDED IN ANOTHER.** — The offence charged in an indictment determines the jurisdiction. The circuit court of Florida having original jurisdiction over assaults with intent to kill, but not over simple assaults, may nevertheless find a prisoner charged with assault with intent to kill, guilty of simple assault; and a statute giving such power does not violate the constitutional provision that circuit courts shall have jurisdiction over offences *not cognisable* by inferior courts. *Winburn v. State*, 9 So. Rep. 694 (Fla.).

**CRIMINAL LAW — PREVIOUS ACQUITTAL — COLLATERAL ATTACK.** — Proof of a previous acquittal for the same offence will discharge a prisoner, when the first prosecution was commenced *bona fide*, although the acquittal was obtained by bribing the prosecuting attorney; but such acquittal will be of no avail if the prosecution was *begun* by collusion with the prisoner, in order that he might be tried at a time favorable for his escape. *Skideler v. State*, 28 N. E. Rep. 537 (Ind.).

**DAMAGES — LEASE — BREACH OF COVENANT TO DELIVER UP IN REPAIR.** — Lessee in breach of his covenant with lessor failed to deliver up the premises in good repair. The lessor, however, had made a new lease of the premises to a third party, to take effect at the expiration of the old lease, the new lessee covenanting to lay out £200 in making alterations in the house, in order to throw it into connection with the adjoining houses. In altering the house he tore down the parts left out of repair by the original lessee, who is now sued for breach of his covenant. The lessor sustained no actual damage. *Held*, the measure of damages for breach of the covenant is the amount required to put the premises into such repair as was originally contemplated by the covenant. *Joyner v. Weeks*, 39 W. R. 583 (Eng.).

**EQUITY — INJUNCTION — ATTEMPT TO ANTICIPATE.** — When upon receiving notice of motion for an injunction to restrain him from building, the defendant immediately puts on a gang of extra men and builds forty feet before receiving notice that an *ex parte interim* injunction has been granted: *Held*, that upon the motion coming on the court will immediately enjoin the defendant from allowing the wall to remain without awaiting the result of the trial. *Daniel v. Ferguson* [1891] 2 Ch. 27.

**EVIDENCE — JUDICIAL NOTICE — PATENTS.** — Courts will not take judicial notice of patents for inventions. *Bottle Seal Co. v. De La Vergne Bottle & Seal Co.*, 47 Fed. Rep. 59.

**JURISDICTION — CIRCUIT COURTS OF APPEAL — CHINESE EXCLUSION ACT.** — A case involving "the application of the Chinese restriction acts to Chinese merchants domiciled in the United States who temporarily leave the country for purposes of business or pleasure *animo revertendi*, in the light of the treaties between the government of the United States and that of China," presents a question of such importance as will justify the Supreme Court in requiring the Circuit Court of Appeals to certify the case to it for review, under Act Cong. March 3, 1891. *Ex parte Law On Bond*, 12 Sup. Ct. Rep. 43.

**LIBEL — PRIVILEGED OCCASION** — The defendant dismissed the plaintiff from its services on account of gross neglect of duty. A statement by the defendant to its servants of the reason for plaintiff's dismissal is a privileged communication, the servants having an interest in knowing what conduct would render them liable to removal, and the defendant being equally interested in having them know what degree of diligence was expected of them. The occasion being privileged, the communication is, unless the plaintiff can show that it was malicious. *Hunt v. The Great N. W. Ry. Co.* [1891] 2 Q. B. 189 (Eng.).

**MORTGAGES — PRIVITY.** — A chattel mortgage is, at the suit of firm creditors, declared void as to part of the debt. Can a second mortgagee claim the property after the payment of that part of the debt which is held good, or only after the payment of the whole debt? *Held*, that the second mortgagee may have the benefit of the amount of deduction of the first mortgage debt, Winslow, J., dissenting. *Hibbard & Co. v. Cribb*, 49 N. W. Rep. 823 (Wis.).

**PARTNERSHIP — NON-TRADING — BILLS AND NOTES.** — A partnership formed for the purpose of conducting a theatre is a non-trading partnership, in respect to the presumption that one of the partners has no authority to give a firm note. *Pease v. Cole*, 22 Atl. Rep. 580 (Conn.).

**PRACTICE — SUSPENSION OF SENTENCE — GOOD BEHAVIOR OF DEFENDANT.** — Courts have no power to suspend sentence except for short periods pending the determination of motions or considerations arising in the cause after verdict. Indefinite suspension during good behavior of defendant is an exercise of pardoning power not possessed by the courts. *U. S. v. Wilson*, 46 Fed. Rep. 748.

**PROPERTY — RIGHT OF POSSESSION OF DEAD BODY.** — A wife may maintain an action against one who mutilates the dead body of her husband, and recover damages for her mental sufferings caused thereby. The court recognizes that there is no property in the commercial sense in a corpse, but holds that the surviving wife has the right of possession for the purposes of preservation and burial. *Larson v. Chase*, 50 N. W. Rep. 238 (Minn.). See p. 285.

**REAL PROPERTY — A devise to A "for his life and the life of his heir" gives A an estate for two lives, the second life not being capable of identification, however, until the death of A.** *In re Amos* [1891] 3 Ch. 159.

**REAL PROPERTY — DISTURBANCE OF EASEMENTS — MEASURE OF DAMAGES.** — Plaintiff bought land in New York abutting upon a street through which defendant company was already operating an elevated railway; but defendant had never exercised its right of condemning the easement to light, air, and access to and through the street which was appurtenant to the piece of land in question. In an equitable action to enjoin defendant perpetually from disturbing this easement: *Held*, that the measure of damages upon payment of which the court would allow defendant to condemn and purchase the easement was the difference between the value of the land with and without the elevated railroad. It was immaterial whether or not plaintiff had paid for the land a reduced price proportioned to the depreciation which had already taken place when she bought it. *Pappenheim v. Metropolitan Elevated R.R. Co.*, 28 N. E. Rep. 518 (N. Y.).

**REAL PROPERTY — INTERFERENCE WITH EASEMENTS — COMPENSATION TO ABUTTERS.** — Although, where the fee of a street is in the public, the Legislature may authorize a steam railroad to be laid along the grade of the street without providing for compensation to abutting owners, yet where the railroad company raises its tracks upon a stone embankment across which the public cannot conveniently pass, it is liable in damages to the abutters for the disturbance of their

easement to a free and reasonable use of the street. *Reining v. N. Y. L. & W. R.R. Co.*, 28 N. E. Rep. 640 (N. Y.).

**REAL PROPERTY — TENANCY BY ENTIRETY — EFFECT OF DIVORCE.** — On the termination, by an absolute divorce, of a tenancy by entirety created by a conveyance to husband and wife, the grantees hold as tenants in common without survivorship. *Stelts v. Shreck*, 28 N. E. Rep. 510 (N. Y.).

**TAXATION — ELECTRIC COMPANIES — NOT MANUFACTURING COMPANIES.** — A company generating electricity and selling it to customers for power, heating, or illuminating purposes is not a manufacturing company and thus within an act exempting manufacturing companies from taxation. *Com. v. Northern Electric Light & Power Co.*, 22 Atl. Rep. 839 (Pa.).

The analogy to gas companies is noted, and a distinction drawn between companies dealing in natural and in artificial gas. 89 N. Y. 409; 108 Pa. St. 111, cited.

**TORT — INFRINGEMENT OF STATUTE FOR EXEMPTION OF DEBTOR — CIVIL ACTION.** — A statute in Indiana exempts from garnishment the wages, for more than one month, of any person with less than \$200; with an added provision that the attempt of a creditor to evade the law by prosecuting claims against such person in another State, whether directly or through another party, shall be criminally punishable by fine. *Held*, that where a creditor violates the latter provision, he is civilly liable to the debtor thus deprived of his exemption. *Kestler v. Kern*, 28 N. E. Rep. 726 (Ind.).

**TRUSTS — PRIOR EQUITY — PURCHASE FOR VALUE.** — B holding shares in trust for the plaintiffs pledged them with the defendant for a private debt. The defendant had no notice of the trust. After learning of it he applied to the company, which had been notified of the trust, to have the transfer registered. By the articles of association, no transfer of stock could be made unless approved by the directors. Upon this ground, *held*, that the plaintiff's prior equity must prevail. The second claimant must be able to show a complete legal title, or at least that all the formalities have been complied with, so that nothing more than a purely ministerial act remains to be done. *Moore v. North Western Bank* [1891] 2 Ch. 599.

This case adopts the true test, and is plainly distinguishable from *Dodds v. Hills*, 2 Hem. & Mill. 424. In that case the company could not object to the transfer of the shares, and accordingly the pledgee immediately upon the transfer of the certificates to himself got a complete legal right—an irrevocable power of attorney which entitled him to demand absolutely the transfer to himself upon the books of the company. Here he got no such complete legal right, and the company could not approve the transfer without assisting in the fraud.

**TRUSTS — PRIOR INCUMBRANCE — REPRESENTATIONS OF TRUSTEE.** — A, with a view to making a loan to the cestui, inquired of the trustee as to the incumbrances already upon the trust funds. The trustee mentioned certain incumbrances, but failed to mention others of which he had been notified, but which he did not at the moment recollect. A made the loan, relying upon the representations of the trustee. The security, owing to the prior incumbrance, of which A had not been notified, proved valueless. *Held*, that, in the absence of representations amounting to estoppel, A cannot make the trustee liable for his loss. *Derry v. Peek* (14 App. Cas. 337) decides that a person is not liable for mere negligent misrepresentations. A trustee owes no duty to the cestui to assist him in incumbering the trust fund. *Low v. Bouverie* [1891], 3 Ch. 82.

**WILLS — DEBENTURE STOCK.** — A bequest of all a testator's shares in a public company will not carry debenture stock. *Bodman v. Bodman*, 40 W. R. 60 (Eng.).

**WILLS — DEBT OF LEGATEE TO THE ESTATE.** — The testator gave property to his executors as trustees, to be converted into money, and he directed that after paying debts, etc., the trustees should pay certain shares of the residue to legatees named. The legatees owed to the testator debts barred by the Statute of Limitations. *Held*, that the trustees should deduct these debts from the shares to be paid to the legatees, although the residue comprised the proceeds of real estate as well as of personal property. *In re Akerman* [1891] 3 Ch. 212.

## REVIEW.

**SUPPLEMENT TO THE REVISED STATUTES OF THE UNITED STATES.** Vol. I. 1874-1891. Prepared and edited by William A. Richardson, Chief Justice of the Court of Claims.

This is a government publication, and can be obtained only from the Secretary of State. On receipt of \$2.00 it will be sent free of postage to any part of the United States. The supplement contains all the laws enacted since the passage of the Revised Statutes "which are neither obsolete, local, temporary and expired, superseded nor repealed, arranged in chronological and numerical order." The arrangement of the work is admirable. The indexing is so thorough that it is a very simple matter to find any given legislation. There are, moreover, many notes and cross-references, and a table of altered sections of the Revised Statutes, which add very much to the usefulness of the book. The work of the editor is so well done throughout that it is impossible to single out for mention any particular excellence.

[Chief Justice Richardson being a graduate of the Harvard Law School, the readers of the REVIEW may be interested in the fact that the preface of the supplement is dated on his seventieth birthday, Nov. 2, 1891.]

## LEADING ARTICLES IN EXCHANGES.

### **American Law Review.** Vol. 25.

No. 6. Liberty of Contract under the Police Power; Property damaged for Public Use; History of First Georgia Code; Note on English Judges of the Present Day.

### **Chicago Legal News.** Vol. 24.

No. 15. Woman Suffrage.

No. 16. Nuisance—Obstructing the Sidewalks.

### **Central Law Journal.** Vol. 33. St. Louis.

No. 21. Bigamy.

No. 22. Bigamy.

No. 23. Taxation of Corporations and Corporate Shares.

No. 24. Taxation of Corporations and Corporate Shares.

No. 25. Validity in one State of a Decree of Divorce by the Tribunals of Another.

### **Albany Law Journal.** Vol. 44.

No. 23. To Demur or not to Demur.

No. 25. Juridical Evolution.

### **Columbia Law Times.** Vol. 5.

No. 3. Sentimental Damages; Liability of Corporation for the Torts of its Agents.

### **Political Science Quarterly.** Vol. 6.

No. 4. Democratic Party; The Single Tax; Sociology as a University Study; Social Contract Theory; Woman Suffrage in Local Government; Lincoln and Seward.

### **Scottish Law Review.** Vol. 7.

No. 84. Common Employment; Trust Deeds by Insolvents.

### **Yale Law Journal.** Vol. 1.

No. 2. Jury System; Incorporation in one State to do Business in Another; Power to compel Physical Examination.

# HARVARD LAW REVIEW.

---

VOL. V.

FEBRUARY 15, 1892.

No. 7.

---

## THE JURY AND ITS DEVELOPMENT.

### II.

1. IN early times the inquisition had no fixed number. In the Frankish empire we are told of 66, 41, 20, 17, 13, 11, 8, 7, 53, 15, and a great variety of other numbers (Brunner Schw. 111-112). So also among the Normans it varied much, and "twelve has not even the place of the prevailing *grundzahl*;" the documents show all sorts of numbers—4, 5, 6, 12, 13-18, 21, 27, 30, and so on (ib. 273-4). It seems to have been the recognitions under Henry II. that established twelve as the usual number (ib. 363); even then the number was not uniform. In the "inquest of office," it always continued to be uncertain. "This, [holding an inquisition] is done," says Blackstone,<sup>1</sup> "by a jury of no determinate number; being either twelve, or less or more." In 1199 (Rot. Cur. Reg. ii. 114) there is a jury of nine. In Bracton's Note Book, at dates between 1217 and 1219, we see juries of 9, 36, and 40,—partly owing, indeed, to the consent of litigants. We have already noticed that the grand assise was sixteen, made by adding the four electors to the elected twelve, and that recognitions as to whether one be of age were by eight. The attain jury was usually twenty-four; but in the reign of Henry VI. a judge remarked that the number is discretionary with the court.<sup>2</sup>

---

<sup>1</sup> Com. iii. 258, cited by Brunner.

<sup>2</sup> For other cases in England and Normandy, see Brunner, Schw. 364, and Hargrave's note, Co. Lit. 155.

2. The rule of unanimity in giving a verdict was by no means universal at first. A doctrine had a considerable application in Normandy and survived in England, that it was enough if eleven agreed; the ground of this being the old rule that a single witness is nothing — *testis unus testis nullus*.<sup>1</sup> Then in certain cases a majority of the twelve was enough; as in the assise of novel disseisin, in which only seven were necessarily present, these seven being then required to be unanimous. Brunner's remark is very likely true, that "Only in the second half of the fourteenth century did the principle get established that in all inquests the twelve must agree in order to a good verdict."<sup>2</sup> The Mirror appears to assert an opinion which I have not observed elsewhere, that "since two witnesses are enough, according to the Word of God" (*solonque le dit de Dieu*), a verdict should be held good if even two only are found to agree.<sup>3</sup> But we are probably to understand this courageous writer to be asserting his own opinion of what ought to be held for law. Thus regarded, his statement seems to overlook the fact that the jury were more than witnesses; they were triors as well; and the explanation of their number being usually greater than the scriptural "two or three" lies probably in those historical considerations to which Brunner (Schw. 112) refers, such as the desire to make up not merely by quality but by quantity for the lack, in the case of the jury, of that amenability to counter proof and the battle which sometimes existed in the case of the older witnesses.<sup>4</sup>

In 1286 the jurors in an assise (probably of novel disseisin) were unevenly divided,<sup>5</sup> but the judgment is given in these words: *et quia dicto majoris partis jur. standum est, consideratum est*, etc.<sup>6</sup> This doctrine of giving judgment with the majority is laid down generally, in the trial of felony, by Britton (12 b): "If they cannot

<sup>1</sup> As to this rule, see Best, Evid. ss. 597-600.

<sup>2</sup> For Brunner's very interesting account of all this, see Schw. 364-371; he cites Bracton, 184 b, 255 b, and 179 b. The last citation relates to the mortdancestor, and runs thus: "The assise is to proceed by twelve jurors . . . and not fewer, as it may in the assise of novel disseisin, by seven at least. . . . And so here let the assise proceed by twelve at least." In the French use of the inquest, the principle of a majority decision prevailed.

<sup>3</sup> c. 3, s. 34; compare c. 5, s. 1, 136.

<sup>4</sup> Harv. L. Rev. v. 51-52.

<sup>5</sup> "*X jur. dicunt unum, et xi. dicunt alium contrarium*," says the account in Pl. Ab. 279, col. 1, Kanc. We must surmise that the xi. is a misprint for ii.

<sup>6</sup> Compare a case of 1199 in Rot. Cur. Reg. ii. 105; s. c. Pl. Ab. 23, col. 2, Suff.

agree let them be separated and examined why. If the greater part know the truth and a part not, let judgment be given with the majority." In 1292 (Pl. Ab. 286, col. 2) it appeared that certain justices, four years before, had given judgment on a verdict of eleven jurymen, obtained by removing the twelfth, who would not agree. In 1318-19, Bereford, C. J., when the twelfth jurymen on an inquest had not appeared, asked the parties whether they would agree to going on with eleven? The reporter notes it as a question, whether this can be done by assent in "pleas of assise and attaints."<sup>1</sup> Fifty years later, on the taking of an assise, one jurymen would not agree with the other eleven. The justices took a verdict from these and imprisoned the twelfth.<sup>2</sup> On moving for judgment, counsel urged that it had formerly been adjudged in trespass that a verdict of eleven might be good, "and this we will show you by record." Thorpe, C. J.: "It is fundamental (*la ley fuit fondue*) that every inquest shall be by twelve . . . and no fewer. . . . Though you bring us a dozen records, it shall not help you; for those who gave judgment on such a verdict were greatly blamed." Moubrey, J.: "Since the verdict was by eleven and judgment cannot be rendered, sue out a new inquest and let the man imprisoned be discharged."<sup>3</sup> The requirement of twelve in the petty jury, unless by consent, and the need of unanimity, seemed now to have become the settled rule.

3. As to informing the jurors: (a) In the first place, they were men chosen as being likely to be already informed; in this respect, as well as others, they were a purged and selected body. I pass by the matter of precautions taken, by way of challenge, and otherwise, to keep off persons unsuitable by reason of favor to a party, or of want of property or social standing. Always they were from the neighborhood — *de visineto*. This expression was not precisely defined, beyond its meaning from the same county; but in practice it went much further. It became the practice to require that a certain number of the jury should come from the particular hundred in question; and these men were expected to inform the others. In an important case of 1374, Belknap, C. J., says: "In an assise in the county, if the court does not see six, or at least five, men of the hundred where

<sup>1</sup> Y. B. 12 Ed. II. 373.

<sup>2</sup> In 1202 (Seld. Soc. Pub. iii. case 241) one jurymen differing from the eleven was fined.

<sup>3</sup> Y. B. 41 Edw. III. 31, 36.

the tenements are, to inform the others who are further away, I say that the assise will not be taken. *A multo fortiori*, those of one county cannot try a thing which is in another county." (Y. B. 48 Edw. III. 30, 17; s. c. Lib. Ass. 315, 5.) A statute of 1543 (35 H. VIII. c. 6, s. 3) required six hundredors. In 1585 (St. 27 Eliz. c. 6, s. 5) this was reduced, in personal actions, to two. "The most general rule," said Coke, early in the seventeenth century, "is that every trial shall be out of that town, parish, or hamlet . . . within which the matter of fact assignable is alleged, which is most certain and nearest thereunto." (Co. Lit. 125.) Much trouble was caused by going into this detail, and at last in 1705 (St. 4 Anne, c. 16, s. 6) it was enacted that in civil cases it should be enough to summon the jury from "the body of the county." In criminal cases the same result appears to have been worked out in practice.<sup>1</sup> Of the conceptions, as to this matter, of the earlier period, we may see a lively illustration in the passage which I place in a note, from Sir Francis Palgrave's "The Merchant and the Friar" (1837), in which, under the guise of a pleasant fiction, he presents curious details of English life in the thirteenth century.<sup>2</sup> Long afterwards it was regarded as the right of the parties to "inform" the jury, after they were empanelled and before the trial. In 1427, we read in the St. 6 H. VI. c. 2, that in certain cases the viscounts must furnish the parties with the jury's names six days before the session, if they ask for it, since (it is recited as a grievance) defendants heretofore could not know who the jury were, "so as to inform them of their right and title before the day of the session," (*pur eux enformer de leur droit ett illes devaunt, etc.*). This statute throws light upon the earlier general statute of

<sup>1</sup> For details as to this, see Note 191, Co. Lit. 125.

<sup>2</sup> These are being explained, so he fables, by an English friar, Roger Bacon, to an Italian merchant, Marco Polo, while showing the stranger over London. They are at Guildhall, and the trial of one of the alleged robbers of the king's treasury, in 1303, is beginning. "Sheriff, is your inquest in court?" said the mayor. "Yes, my Lord," replied the sheriff; "and I am happy to say it will be an excellent jury for the crown. I myself have picked and chosen every man on the panel. . . . There is not a man whom I have not examined carefully. . . . All the jurors are acquainted with [the prisoner]. . . . I should ill have discharged my duty if I had allowed my bailiff to summon the jury at haphazard. . . . The least informed of them have taken great pains to go up and down in every hole and corner of Westminster,—they and their wives,—and to learn all they could hear concerning his past and present life and conversation. Never had any culprit a better chance of having a fair trial," etc.



42 Edw. III. c. 11 (1368), mentioned in 3 Bl. Com. 353. Probably Coke's remark about it in 3 Inst. 175, that both parties must be present when this information was given, are a modern gloss; although, doubtless, a party had to keep inside the law of embracery.

It was a little later than the time of Palgrave's story when Thomas Makerill and his brother, in 1317, were arrested for assaulting an officer of the court in "Fletestrete," and twelve men of the court, in whose presence this took place, and also twelve men of the *visne* of "Fletestrete" were summoned for a jury (Pl. Ab. 331, col. 1). About 1356, when a judge of the Common Bench complained in the Exchequer against a woman for calling him "traitor, felon, and robber," the case went to an inquest of "attorneys of the Common Bench and the Exchequer" (Lib. Ass. 177, 19).

(b) These cases illustrate a very common method of securing for the jury a better knowledge of matters in issue, viz., that of combining men of different *visnes*, who might inform each other. This existed in Normandy; and we notice it in our own earliest records, as in 1199 (Rot. Cur. Reg. ii. 10). A remarkable instance of the use of separate juries for amassing their several contributions of knowledge by separate verdicts is found in the proceedings on occasion of the great robbery of the royal treasury at Westminster Abbey, in 1303. Mr. Pike, to whom we owe this information, cites the case as illustrating the progress made in separating the accusing and the trial jury (Hist. Crime, i, 198-200; 207-8, 466). The king appointed a commission of inquiry. "A jury was empanelled for every ward of the city of London, and for every hundred of Middlesex and Surrey—and in addition to these there was a jury of goldsmiths and aldermen." They charged certain persons. Five justices were then directed to try the accused. "Juries were summoned from the same hundred and wards as before, but in obedience to a different commission." It is not clear, in this case, just how the separate juries were used at the trial. In general, separate panels in such cases were combined in one. In 1230 (Br. N. B. ii, case 375), seven from Surrey and seven from London were united into one jury by consent. It was the practice, later on, at any rate,<sup>1</sup> where two panels were sum-

---

<sup>1</sup> As in 1402, Y. B. 4 H. IV. 1, pl. 2; and in 1619, Hob. 330.

moned from different counties, to choose one juror alternately from each.

(c) Moreover, as among eligible persons, there seems always to have existed the power of selecting those especially qualified for a given service. Jurors are summoned not merely from closer or less close neighborhoods, but from the *senioribus et legalioribus*, as asked in 1198 (Rot. Cur. Reg. i. 354); and from experts and men of particular trades, like the London juries of cooks and fish-mongers, where one was accused of selling bad food.<sup>1</sup> What we call the "special jury" seems always to have been used. It was a natural result of the principle that those were to be summoned who could best tell the *veritatem rei*. And so we read that in 1645-6, in the King's Bench, . . . "The court was moved that a jury of merchants might be retained to try an issue between two merchants, touching merchants' affairs, and it was granted, because it was conceived they might have better knowledge of the matters in difference which were to be tried than others could who were not of that profession" (Lilly's Pract. Reg. ii. 154).

In some cases this selection was regulated. In the grand assise, as we have seen, knights were regularly the jurors. So in the jury of attain (Bract. 291). In 1323 (Fitz. Ab. Attaint, 69), when it was objected that there were no knights on the jury, Herle, J., said, "You never saw such a jury taken without a knight," and ordered a *venire facias* of knights and others. In Coke's time (Inst. 156), we read that "in an attain there ought to be a knight returned of the Jury."<sup>2</sup>

Trials at bar often required special juries. Indeed, Blackstone (iii. 357) is willing to say that "special juries were originally introduced in trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent

<sup>1</sup> Ryley, Mem. London, 266 (1351); ib. 536 (1394); Palgrave, Merch. and Friar, 190-194. The jury of the "half tongue," *de medietatem lingue*, was founded on considerations of policy and fair dealing, rather than a wish to provide a well-informed jury. See "Ordinance of the Staples," 27 Edw. III. st. 2, c. 8 (1353); and St. 28 Edw. III. c. 13 (1354).

<sup>2</sup> The challenge for this defect is supposed to have been abolished in 1751 by St. 24, Geo. II., c. 18, s. 4, although the recital in this section deals with another sort of case. In Blackstone's time (Com. iii. 351), the rule in attain was "twenty-four of the best men in the country."

causes as to warrant an exception to him." The itinerant method of administering justice as it developed into the *nisi prius* system resulted in sending down most actions to be tried in the counties rather than at Westminster (Bl. Com. iii. 352-4); but in 1285, in regulating this system, it was expressly provided (St. West. II. c. 30): *Sed inquisitiones de grossis et pluribus articulis, qui magna indigeant examinatione, capiantur coram justiciariis de bancis, nisi ambae partes*, etc.<sup>1</sup> For the handling of these greater and more complicated causes, there was picked out a better class of jurymen; or at least there was allowed to the parties themselves a considerable hand in the selection.<sup>2</sup>

As regards special juries in general, we seem to observe the transition from the older, unregulated system to the modern one soon after a case in 1724,<sup>3</sup> where, on a motion for a special jury in the King's Bench, and a question whether this could be had without consent of the parties, "the master of the office was ordered to search for precedents, and he reported that about thirty years ago there were several precedents for special juries upon trials for nice points, without the consent of the parties, but that in the last thirty years there were several motions made for that purpose, but always denied. . . . Three of the judges (out of four) were of opinion that a special jury might be granted to try a cause at bar without the consent of the parties, but never at the *nisi prius* unless very good cause was shewed (and not shown here); therefore, since the high sheriff is the proper officer to return juries, and there is no imputation against him . . . the court would not vary from him without the consent of the parties." Thereupon, by a declaratory statute in 1730 (Stat. 3 Geo. II. c. 25, s. 15), it was enacted that either party in any case, as well criminal as civil, may have a special jury on motion

<sup>1</sup> And so in 1699 (Lord Sandwich's case, 2 Salk. 648), per Holt, C. J. "Where there is value or difficulty, we are bound of common right to grant trials at the bar," citing this passage from Stat. West. II.

<sup>2</sup> In 1661 (Wheeler v. Honour, 1 Keble, 166) we read: "which Windham, J. agreed: and trials at bar are to the end to have the most discreet persons, and therefore to clap on ordinary persons upon a tales in such cases was not fitting." In 1738 (Smith d. Dormer v. Parkhurst, Andrews, 315), on a question of granting a new trial, after a trial at bar, counsel argue: "The evidence of one or two witnesses ought not to overturn the finding of twelve gentlemen of figure and fortune, who might, too, be governed by their own knowledge."

<sup>3</sup> The King v. Burridge, 8 Mod. 245.

at his own expense. And the matter was further regulated by later acts.

(d) From the beginning of our records, we find cases, in a dispute over the genuineness of a deed, where the jury are combined with the witnesses to the deed. This goes back to the Franks; and their custom of requiring the witness to a document to defend it by battle also crossed the channel, and is found in Glanville (lib. x. c. 12). As regards these earlier details, and the significance and relation to the old law of this fact of allowing one's self to be thus preappointed as a witness, I must merely refer to very interesting passages of Brunner.<sup>1</sup> In these cases the jury and the witnesses named in the deed were summoned together, and all went out and conferred privately as if composing one body; the witnesses did not regularly testify in open court. Cases of this kind are found very early, *e. g.* in 1208-9 (Pl. Ab. 63, col. 1, Berk.). In 1208 (ib. 56, col. 2, Suff.), there is an offer of the defendant to put himself on *legalem juratam patrie*, and on the witnesses to a deed, eleven of whom are named, and it is added, *et alii multi*. Some light is thrown on the conception at the bottom of this introduction of so many names as witnesses, when we observe that people wrote in the names of absent friends and got their consent afterwards. It was only a few years after these cases when one of John's barons, being in prison and desirous of raising money, wrote to three distinguished friends asking, as they could not be present at the execution of his deeds, and as he had written in their names as witnesses, that they would consent to this.<sup>2</sup> A witness to a deed, according to the popular conception, was not necessarily one who had seen it executed, but one who was willing to give it credit by his name. This may account for its turning out so often, when witnesses were questioned, that they knew nothing about the matter.

In 1219, the parties put themselves on the witnesses and a jury. The order is "*fiat inde jurata per . . .* (seven witnesses) *et per . . .* (nine others) *et veniat . . . ad recognoscendum,*" etc.

<sup>1</sup> Schw. 197-8; ib. 434-6. Brunner cites the case of Bishop Wulfstan v. Abbot Walter, which is in Big. Pl. A. N. 16, 287; s. c. Essays in Angl. Sax. Law, 377.

<sup>2</sup> *Quia ad cartas faciendas . . . presentiam vestram habere non potuimus precamur . . . ut de cartis nostris in quibus ob securitatem obtinendam testes estis ascripti, testes esse velitis.* Ellis's Letters, 3d Series, i. 25.

(Br. N. B. ii. case 51). The jury, it will be noticed, is said to be composed of the two; and as the jury proper are often questioned by the court in giving their verdict, so the witnesses are sometimes thus questioned separately. A very interesting instance of this occurs in 1236,<sup>1</sup> where the whole combination answers that they never heard of the deed till it was brought and read publicly to the county court and the persons named in it were asked to give testimony. Then the witnesses are questioned separately, and all but three say this again and add that they never knew that they were named till in the county court. Three, differing somewhat from the others in their account, say that they had seen the deed several years ago, and had been asked by the maker to be witnesses and furnish testimony. As to seisin, the three say that they know nothing more than what they have answered *cum aliis juratoribus in communi*. Then all, *tam juratores quam testes*, are questioned as to something else, and say they do not know, but rather think, (*melius credunt*) etc. Asked how they know that the said Abbot was not seised, . . . they say that they know this well and it is very clear because the same G. enfeoffed a certain R. of the site of a horse-mill at Michaelmas, etc. And more of the same sort.<sup>2</sup> In 1318,<sup>3</sup> on a question arising incidentally in an action of trespass as to an alleged release of the plaintiff, the parties put themselves on a jury and on the four witnesses named in the deed. The jury answer, that they have examined the witnesses, that these differ, and they cannot make out from this examination what the fact is. But they give reasons for suspecting the credibility of the witnesses, and therefore make their definite answer (*dicunt precise*) that the release is not the plaintiff's deed. The justices then, *ut rei veritas . . . apercius et evidencius sciretur*, immediately question the four witnesses separately, in curious detail; they find them discordant, and give judgment on the verdict.<sup>4</sup>

<sup>1</sup> Bracton, N. B. iii. case 1189.

<sup>2</sup> See also a good case in 1227 (Br. N. B. ii. case 249), where four witnesses and nine jurymen are summoned. Separate answers are recorded.

<sup>3</sup> Pl. Ab. 331, col. i. London; s. c. *MS.* copy from the Record Office.

<sup>4</sup> "The justices immediately called the four witnesses before them and examined each of them separately as to the making, sealing, and place and time how and when, and other necessary circumstances touching the deed." They were discordant and untrustworthy, "for [continues the record] three of the said witnesses . . . said before the justices that they were not present at the making, or sealing, nor ever saw the deed or

In the earlier cases these witnesses appear, sometimes, to have been conceived of as a constituent part of the jury; it was a combination of business-witnesses and community-witnesses who tried the case,—the former supplying to the others their more exact information, just as the hundreders, or those from another county, did in the cases before noticed. But in time the jury and the witnesses came to be sharply discriminated. Two or three cases in the reign of Edward III. show this. In 1337, 1338, and 1349<sup>1</sup> we are told that they are charged differently; the charge to the jury is to tell the truth (*a lour ascient*) to the best of their knowledge, while that to the witnesses is to tell the truth and loyally inform the inquest, without saying anything about their knowledge (*sans lour scient*);<sup>2</sup> “for the witnesses,” says Thorpe, C. J., in 1349, “should say nothing but what they know as certain,

knew of it until on a certain Thursday they came all together to the manor . . . and found there this said Richard, who showed them the said writing and said it was his deed. Each of them was asked, separately and by himself, at what hour they came there, and in what building in the manor Richard showed them the writing, and how he was dressed. One of them said that they came there in the morning before sunrise, and that the writing was shown to the four witnesses in the queen’s chamber of the manor; and Richard was dressed in a German tunic *de Medleto*, and was shod in white shoes. The second said that they came at six o’clock (*hora diei prima*) and the writing was shown to the four witnesses at this hour, in the hall of the manor. The third said that they came, all at the same time, at nine o’clock (*hora diei quasi alta tertia*) and Richard showed them the writing in the stable of the manor, and he had on a black cloak. The fourth witness, William de Codinton, said that he never came to the manor with the said three witnesses, and never knew or heard of the making of the writing, or whether it was or wasn’t Richard’s deed, except from the report of the three witnesses, who gave him to understand, and swore to it, that the writing was Richard’s deed.” The judgment was against the deed, reciting the jury’s verdict and the worthlessness of the witnesses’ testimony.

<sup>1</sup> Y. B. 11 & 12 Edw. III. 338; Lib. Ass. 34, 12; and Lib. Ass. 110, 11.

<sup>2</sup> “It is an abuse,” says the Mirror, a little earlier than this, “to use the term ‘*a lour escient*’ in the oath, and make jurors decide upon thoughts (*quiders*), since the principal word in their oath is that they will say the truth.” c. 5, s. 1, 135. Professor Maitland, to whose labors legal scholars are so greatly indebted, in giving some account of the earliest (manuscript) Register of Writs which he has seen, one of 1227 (3 Harv. Law Rev. 97, 110 et seq.), prints from it an interesting note relating to the grand assise. “*In hac assisa non ponuntur nisi milites et debent jurare precise quod veritatem dicent, non audito illo verbo quod in aliis recognitionibus dicitur, scilicet a se nescientur.*” Doubtless, as Maitland suggests, this last is a misreading of the barbarous law French *a son ascient*. This passage helps us to see exactly what Sharesbille, J., meant in the next century, when he said (Y. B. 11 & 12 Edw. III. 341), of the witnesses, *lour serement est a dire verite tut atrenche, auxi com ils sunt jures en un grant assise, et nemye a lour ascient*. Of the queer phrase, *tut atrenche*, Selden surmises that it is a corruption from *tout oultrance*. Note 43, Hengham Magna, c. xii.

*i.e.*, what they see and hear. If a witness is returned on the jury, he shall be ousted. A challenge good as against a jurymen is not good against a witness. If the witnesses and the jury cannot agree upon one verdict, that of the jury shall be taken, and the defeated party may have the attain against the jury; had they followed the information of the witnesses the attain would not lie, unless they found against the deed." In that case it might, for it was conceived that a negative could not be certainly known to the witnesses. This method proved inconvenient. Among other reasons, the number of the witnesses was often large. So long as the trial could not proceed without them, there was great inconvenience endlessly; and the twelve jurymen made quite enough of that. Accordingly by the statute of York (12 Edw. II. c. 2), in 1318, it was provided that while process should still issue to the witnesses as before, yet the taking of the inquest should not be delayed by their absence. In this shape the matter ran on for a century or two. By 1472 (Y. B. 12 Edw. IV. 4, 9), we find a change. It is said, with the assent of all the judges, that process for the witnesses will not issue unless asked for.

As late, certainly, as 1489 (Y. B. 5 H. VII. 8) we find witnesses to deeds still summoned with the jury. I know of no later case. In 1549-50 Brooke, afterwards Chief Justice of the Common Bench, argues as if this practice was still known:<sup>2</sup> "When the witnesses . . . are joined to the inquest," etc.; and I do not observe anything in his Abridgment, published in 1568, ten years after his death, to indicate that it was not a recognized part of the law during all his time. It may, however, well have been long obsolescent. Coke (Inst. 6 b) says of it, early in the seventeenth century, "and such process against witnesses is vanished;" but when or how he does not say. We may reasonably surmise, if it did not become infrequent as the practice grew, in the fifteenth century, of calling witnesses to testify to the jury in open court, that, at any rate, it must have soon disappeared when that practice came to be attended with the right, recognized, if not first granted, in the statute of 1562-3 (5 Eliz. c. 9, s. 6), to have legal process against all sorts of witnesses.

(e) But in the earlier times there were other combinations of

---

<sup>1</sup> See also Lib. Ass. 243, 23(1366).

<sup>2</sup> Reniger v. Fogossa, Plow. 1, 12

the community-witnesses who ordinarily composed the jury, with business-witnesses and the like. In 1225 (Br. N. B. iii. case 1041), on a question of villeinage, six are summoned from the neighborhood *ad recognoscendum cum parentibus . . . quas consuetudines*, etc. In 1226 (ib., case 1707), on a question relating to a partition, the viscount is ordered to find out who were present at the partition *et ex illis et aliis venire faciat xii., etc., ad recognoscendum*, etc. In 1227 (ib., case 1919), in a case of dower, the viscount is directed to find out who were present at the endowing and from these and others to summon twelve.<sup>1</sup> In an interesting case of 1323 (Y. B. Edw. II. 507), in a case of dower *assensu patris*, counsel for plaintiff says: "We put forward a deed which testifies the assent; but that naturally lies *enproeve* (i.e., in proof by witnesses) and not *en averrement* (i.e., proof by jury), for it is not in the conusance of the country but of those who were present, and we are ready to aver the consent by them and others (i.e., by a jury with them). . . . Bereford, C. J. We have nothing to do here with the witnesses named in the deed, for it is not denied; but we will cause those to come whom you will name as present when you were endowed, together with a jury (*ovesque bon pays*). Ald. (for defendant). That will be hard, for he may name *ses cosyns et ses auns*, who by his procurement will decide against us." But it was allowed.<sup>2</sup> This sort of thing seems to have been a mingling of the old procedure and the new. The proving by witnesses present at the endowing was the old *lex recordamenti*. An account of it in Normandy is found in Brunner (Schw. 342-3). A case of 1236-7 (Br. N. B. iii. case 1187) probably belongs to this class, where on a question relating to an alleged gift and seisin of a manor by the father of a tenant in capite now claiming it, the viscount is to summon twelve from the visne of the manor *ad recognoscendum utrum . . . dedit . . . et . . . fuit in seisin . . . et quod venire faceret coram predictis liberos homines . . . ad recognoscendum utrum, etc.* It seems probable that this passage is corrupt and should read *cum predictis*.<sup>3</sup>

<sup>1</sup> For the form of the writ, see Bracton, 304 b. Other cases are Br. N. B. ii., cases 91, 154. See also ib., case 456; s. c. ib., case 595 (1230); ib., case 631 (1231); Bracton, 380.

<sup>2</sup> See also a case of 1315, Y. B. Edw. II. 278.

<sup>3</sup> The original roll is not extant (Br. N. B. i. 161); but Professor Maitland, the editor of the Note Book, who did me the great kindness of examining that again at the British Museum, declares that there can be no doubt that the copyist has made it *coram*.



Before leaving this class of cases, it is interesting to notice that two centuries ago the Puritans of our Plymouth Colony used now and then, out of policy, when they were trying a case relating to an Indian, to add Indians to the jury, as in a criminal case in 1682.<sup>1</sup>

(f) Our earliest records show the practice of exhibiting charters and other writings to the jury. These things, *par excellence*, used to be known as "evidence" and "evidences." In a great degree, they belonged to the stage of pleading, — in so far as they were wholly or in part the ground of action or defence, or a negation or qualification of it. A record, and so a fine or recognizance, or a charter under seal, bound one who was a party to it and sometimes one who was not. Should such a thing be produced in pleading, the execution of it must be admitted or denied. If admitted, that was the end of the matter. If denied and put in issue, then the question was on the genuineness of it, not on its truth or operative quality. Such documents, if admitted, must be met by others of equal force. When the pleadings were over, it might well be that they should be shown to the jury in illustration of the exposition made to the jury by counsel; in fact, this was often done, "to inform the jury." Other documents also were shown to the jury, — any which might illustrate or support the statements of counsel. And these statements themselves were "evidence." It must be closely held in mind that all through the period when the jury went on their own knowledge, they listened to perfectly unsupported narratives of fact from counsel, not under oath.

How if one who should have pleaded a charter or record did not plead it, relying, perhaps, on the jury, who might know of it? Could they find a matter of record or a deed without having it shown them? If they knew of it, must they find it, — being sworn to tell the truth? And how if they know the fact to be otherwise than as this deed or record represented it? How if they knew the fact to be otherwise than as the pleadings represented it? Were they not perjured if they did not tell the truth? These

<sup>1</sup> Plym. Col. Records, vi. 98. So in 1675 (*ib.* vol. v. 167-8), six Indians were added to the jury of twelve, on the trial of three Indians for the murder of another Indian. "It was judged very expedient by the Court that . . . some of the most indifferentest, gravest and sage Indians should be admitted to be with the said jury, and to help to consult and advise with, of and concerning the premises." The verdict ran thus: "We of the jury, one and all, both English and Indians do jointly," etc.

were serious questions, and some of them troubled the lawyers for centuries.<sup>1</sup>

Let us look at some of the cases: In a case of about the year 1200,<sup>2</sup> the jury, if we may trust a lively and intelligent chronicler, made short work of a charter. The plaintiff claimed seisin of certain lands in right of a ward, as her inheritance; the defendant relied on a deed of the father of the ward. The deed was read to the assise in open court. Their verdict, as it is reported, was "that they knew nothing of our chartularies or private agreements (*juramento facto, dixerunt milites se nescire de cartis nostris, nec de privatis conventionibus*), but that they believed that Adam and his father and grandfather, for a hundred years back, had held the manors in fee one after the other. And so we were disseised by the judgment of the court."

In our earliest reports we find the use of documents merely as evidence to the jury. In 1294 (Y. B. 22 Edw. I. 450), there is a case in which a doctrine was applied which had led to a struggle a little earlier (ib. 428), viz., that although one had lost in a possessory assise, this was no bar to his recovering, in a writ of right. In an assise of mortdancestor, where the tenant's defence was that plaintiff's ancestor had enfeoffed him by a charter and did not die seised, the assise found this true, and gave their verdict for the tenant. The demandant, nevertheless, brought a writ of right and was upheld in it, and it was said that the defence must be by battle or the great assise and not by the charter: "Yet the charter may be put forward as evidence (*en evidence*) to the grand assise."

Where a charter gave a ground of action or defence, it must regularly, as we said, be pleaded, for if admitted, it might save going to the assise; if it were not pleaded, one would not regularly use it in evidence to the jury. But the jury would, perhaps, be helped by having it put in evidence; and they could have it if they wished. In 1292 we find this stated in a note by the re-

---

<sup>1</sup> The perplexities that were caused sometimes by conflicting charters (forgery even by holy men was very common) are shown by the exclamation of Henry II. when they produced charters before him on both sides: "*Iste carte ejusdem antiquitatis sunt et ab eodem rege Aedwardo emanant. Nescio quid dicam nisi ut carte ad invicem pugnent!*" Big. Pl. A. N. 239. The point of Henry's joke lay in its hint at the Norman method when opposing witnesses differed. Harv. L. Rev. v. 52.

<sup>2</sup> Forsyth, Tr. by Jury, 129-130, citing Jocelyn de Brakelonde.

porter, which is given below.<sup>1</sup> Of course this in principle is just as much helping the jury by evidence as if a witness came before them to testify. The fact that they might be ignorant of such things was noticed in the Stat. West. II. c. 25, in providing against certain dangers from the *festinum remedium* of the novel disseisin: If the defendant against whom the assise may have passed in his absence afterwards show the justices charters or releases "in which the jury were not examined, nor could be, because not mentioned in pleading, and probably they might be ignorant of such writings," — the jury and the parties were to be resummoned. (Y. B. 13 Edw. III. 80.)

In 1339 (Y. B. 13 Edw. III. 80), Scharshulle, J., is reported as saying that since a warranty requires a specialty, if it be not pleaded or put in evidence, a finding of it by the assise shall not hold. It was the rule in attain, as well before as after witnesses were allowed to testify to jurors, that the plaintiff should give nothing in evidence to the "grand jury," as they called it, additional to what the first jury had had; for the question was whether, upon what these knew and ought to know, their verdict was false.<sup>2</sup> In 1351-2 (Lib. Ass. 121, 12), counsel complains of his adversary in attain, that he is putting forward in his pleading a release not pleaded in the first case, of which, therefore, the first jury could not have had cognizance. But he is answered that there was no opportunity to plead it, and that it *was* given in evidence to the former jury.

A distinction was made between sealed writings and others. The former were regarded as authenticated by the seal; the others were not "authentic." Yet, just as counsel might freely make statements of fact to the jury, unsupported otherwise, so they might exhibit to them unsealed writings. The jury could carry out with them only writings under seal. The presence of the writing at the private consultation of the jury seems to have been conceived of as if it were a witness to a deed, or one of those who testified to a view, or those present at the giving of

<sup>1</sup> "NOTE.— If a charter be put forward to inform the assise after they are sworn and charged, the charter will not be received unless the assise ask for it. To have the charter inform the assise, one should plead on the charter and say this: 'He did not die seised, etc., for he enfeofed us by this charter, and then put forward the charter to inform,'" etc. (Y. B. 20 Edw. I. 20.)

<sup>2</sup> Brooke, Ab. Attaint, 68; Rolfe v. Hampden, 1 Dyer, 53 b (1542); Heydon v. Igrave, 2 ib. 129 b (1556).

dower; it must be only an "authentic" paper that could testify there. And so in 1352 (Lib. Ass. 120, 4) we find that on a question as to the prescriptive title to tithes of the Master of St. Cross at Winchester, an ancient register of tithes, of a hundred years back, was put forward in evidence, and because it was not sealed the jury only inspected it and gave it back before they went out.<sup>1</sup>

One or two more cases may be cited in order to bring down the showing of documents to the jury to the modern form. As the practice of submitting writings to them was far older than that of admitting ordinary witnesses, so the conditions and qualifications of it were earlier fixed. In 1340 (Y. B. 14 Edw. III. 25-34), the assise, in novel disseisin, had found in a special verdict that the tenant had previously brought an action for the same land and had recovered; the tenant had pleaded this, but had not produced the record. The judges asked the jury how they knew this, "since" (to quote the record) "pleas and judgments of the king's court are of record and outside the notice and cognizance of a jury of the country. They said that they had not any certain knowledge (of it) . . . and would not positively say that there was such a plea, . . . but by reason of the summons and resummons . . . and the view . . . and its being commonly said in the country that there was such a plea and such a judgment rendered in the said form, and because the viscount had a writ . . . to put the said John . . . in seisin, as he said, and did put him in seisin, they understood that there was such a plea and such a judgment rendered between the said parties." The report adds: "Scharshulle, J. The assise has expressly said (&c.) . . . and what they say about a recovery does not lie within their cognizance," etc. It turned out that the jury were substantially right; there was such a record, but owing to a slight variance between the form of it and the pleading, judgment was finally given for the plaintiffs.<sup>2</sup>

It was, then, as it would seem, improper for a jury to find spe-

<sup>1</sup> Gawdy, J., in *Vicary v. Farthing*, Cro. El. 411 (1595) said, "It is also clear that writings or books which are not under seal cannot be delivered to the jurors without the assent of both parties." This was law in New Jersey down to 1797. *State v. Raymond*, 21 Atl. Rep. 328 (Feb., 1891). We find it laid down still in Lofft's *Gilbert* (ed. 1795), i. 21, accompanied by that sort of baffling and inadequate reasoning which Gilbert often sets forth regarding matters not understood.

<sup>2</sup> See Mr. Pike's careful statement of the case (Intro. xxxvii-xl).

cifically matter of record without evidence.<sup>1</sup> And in 1419-20,<sup>2</sup> in a case much debated, it was held, with some difference of opinion among the judges, that a jury cannot in a special verdict find a deed which has not been pleaded or given in evidence: "Hull [J.], This deed is only the private intent of a man, which can be known only by writing; and if the writing be shown, it may lawfully be avoided in several ways, as for *non sane* memory, being within age, imprisonment, or because it was made before the ancestor's death, and the like — things which the party cannot plead unless he have oyer of the deed, and it be shown."

An important step in the use of writings to the jury is recorded in a case of 1409 (Y. B. 11 H. IV. 17, pl. 41), "The plaintiff in an assise gave a writing (*escrowment*) to a juror who had been empanelled, as evidence of his matter.<sup>3</sup> After the juror with the others was sworn and put in a house to agree on the verdict, he showed the writing to his companions; and the officer in charge of the inquest stated the matter to the court. Whereupon the justices took the writing from the jurors, took their verdict, questioned the jurors as to the time of giving the writing, and found as stated above. The plaintiff had a verdict, and now prayed his judgment. Gascoigne, C. J., and Huls, J., said that the jury, after they were sworn, ought not to see or take with them any other evidence than that delivered to them by the court and put forward by the party in court on the showing of his evidence. And since he did the contrary . . . he should not have judgment. The plaintiff said that the writing proved merely what he had given the jury at the bar, and so it was not bad, as he did not speak to them *en evidence*. *Et non allocatur*." It has been justly remarked by Starkie<sup>4</sup> that "the exercise of this kind of control was in truth the foundation of that system of rules concerning evidence before juries which has since constituted so large and important a branch of the law of England."<sup>5</sup>

---

<sup>1</sup> Br. Ab. Assise, 258. But it was competent for a jury, at the peril of the attain, to find a general verdict which might cover such a matter, and might rest merely upon their general knowledge of it. In this case, for instance, if they had chosen, they could have answered definitely (*precise*), no disseisin. See Vin. Ab. Trial, Q. f.

<sup>2</sup> Y. B. 7 H. V. 5, pl. 3.

<sup>3</sup> See *ante*, p. 298.

<sup>4</sup> "Trial by Jury," Little & Brown's ed. 39; reprinted from (English) Law Review, II.

<sup>5</sup> For a good illustration of this sort of control, see Y. B. 21 Edw. IV. 38, 1.

(g) There were other ways of informing the jury. Of guiding and restraining them I shall say more hereafter. The judge gave them their "charge," and each party or his counsel explained to them his contention. In our earliest reports a charge from the judge precedes the statements of counsel. In the first case in our extant Year Books (20 & 21 Edw. I. 3; A.D. 1292), there is a charge to the jury, but no report of any address on either side. In the same volume and year, in an assise of mortdancestor, the defendant is told by the judge to omit something from his oral pleading and plead only to the points of the assise: "What you say about your pledges (*dites ceo en evidence de lasise*), say it in evidence to the assise." In 1302, after the "great assise" was sworn, Berewyk, J. (Y. B. 30 & 31 Edw. I. 116-118), said to them: "John de Kilcayt heretofore brought a writ of right against William de Bodom and demanded eighteen perches, &c.,<sup>1</sup> whereupon W. came and put himself on God and the great assise. We have (not)<sup>2</sup> the record, how they pleaded. You have nothing to say except only what you are charged with—as to the right." Then Mutford (counsel) speaks for John, setting forth that J.'s grandfather was seised of the land "as of fee and right," that it descended to his son John and from him "to this John who demands it as his son. And such is his right." Hunt then speaks for William: "This same John enfeoffed G. of the advowson of the church of C. with its appurtenances; and this land is appurtenant to the church of C. And this is William's right and the right of his church." The great assise then went out.<sup>3</sup> Of the same period (ib. 528), is a charge in a criminal case. One W., the stabler of J.'s horse, had been kicked while trying to mount

<sup>1</sup> This "&c." appears to be explained by the words of the oath which are given: "Hear this, ye justices, that I will tell the truth and will not fail, who has the better right in eighteen perches of land and the third part of seven acres of land with the appurtenances in N., whether William Bodom, parson of the church of C., to hold in right of his church at C. as he holds, or J. Kilcayt to have as he demands, so help me God," etc.

<sup>2</sup> One of three manuscripts used in preparing this volume, as we are told (p. 119, note; compare ib. xlix), says "we have;" the others, "we have not." The former reading seems the more probable.

<sup>3</sup> The report closes thus: "The great assise went out. Then came back two knights and wished another knight. Berewyk [J.] to the marshal,— 'Don't allow any of them to come in unless all come together.' The great assise: 'Sir, we say that W. has better right to hold as he holds, than his adversary as he demands.' Brumpton [J.]. 'Therefore the court awards that W. retain the same land as his right and the right of his church of C. to the end of the world (*a remenaunt de monde*), quit of J. and his heirs forever; and that J. be in mercy.'"

him, so that he died. J. has been charged by the jury of accusation with retaining his horse, although he had thus become a *deodand*, and with having buried W. without calling in the coroner. He denies both charges and puts himself on the *patria*. The judge, turning, probably, to the same jury that had accused the defendant, replies: "*Ecce hic bona patria de duodecim*. Read the names and save him every sufficient challenge." Some challenges were made, *que triebantur per residuos de duodecim*. The judge proceeds to charge the jury thus: "If W. died from the kick of the horse, the horse would be *deodand*. If not it would be John's. If the king should lose through you what rightly belongs to him, you would be perjured. If you should take away from John what is his, you would commit a mortal sin. Therefore, by the oath you have made, disclose and tell us the truth, whether the said W. died of the horse's kick or not. If you find that he did, tell us in whose hands is the *deodand* horse and what he is worth; and whether the said W. was buried without a view of the coroner."

It will be noticed that the charge had the effect not merely to bring clearly to the jury's mind what they were to pass upon, but also to prevent their wandering away into irrelevant matters — matters not in issue. Exactly what might have been admitted by the pleadings, or what was the scope of the issue, it was not always easy to say. It was for the judges to keep the jury within proper limits. "Good people," said Bereford, J., in Y. B. 34 Edw. I. 166 (1306), "you have only to inquire whether any of the predecessors of the aforesaid Prior presented the last person," etc.<sup>1</sup>

(4) We find early in the Year Books the beginning of a discussion which is forever going on in the fifteenth century, as to how far one can go in his pleading; what should be pleaded, and what is merely "evidence" of the facts to be pleaded; what shall be entered on the record, and what shall be left to be "said in evidence to the jury." We say nowadays that "facts" are to be pleaded, and not the evidence of facts. That was early said, but it was very far indeed from being rigidly enforced. Often we find the courts allowing one to set forth his case fully, "for fear of the laymen," *i. e.*, in order that the jury might not pass upon questions of law, and might not go wrong through any misapprehension of the

<sup>1</sup> And so, in Y. B. 30 Edw. I. 132, Brumpton, J., after reciting the process: "Good people the points of the assise are agreed on. You have only to say," etc.

facts. Much "evidence" was thus entered on the records; once there, it got recited to the jury when they were sent out, and was clearly brought to the notice of all who had occasion to address the jury, as well the counsel as the court. Sometimes, also, this served the purpose of preserving a memorial, in case of further litigation, of exactly what was involved in any given case. Of the last we see an instance in 1306 (Y. B. 34 Edw. I. 118-120), where a defendant found put forward against him a deed of release by his father of certain rent now claimed. He met this by a long statement, setting forth that his grandfather had a rent of double this amount; that it descended in halves to two sons; that his father, one of these, had released his rent, but subsequently his uncle's share had descended to him. He went on to admit the release, but prayed that this statement "might be entered on the roll so that we be not foreclosed on another occasion from demanding the same services. And it was granted by the court."

In 1305 (Y. B. 33 Edw. I. 100-107), the plaintiff demands tene-ments of the defendant, tracing title by descent from his great-grandfather. The defendant answers that the land is part of a manor of which plaintiff's grandmother was seised, and that she gave this land in tail to the defendant's father, from whom the defendant takes his inheritance. The plaintiff replied that his great-grandfather had separated from the manor the land now demanded, and given it in frank marriage to R. M., who was seised of this land until after the deed of the grandmother was given, and so she was not seised when she gave her deed. The defendant insisted that his assertion of the grandmother's seisin should be traversed as simply as he had alleged it; without limiting it to time. And Bereford, J., said to the plaintiff, "It is fit that you traverse him; and what you give in answer shall be in evidence that she was not seised because R. M. was seised; and it shall be entered and the inquest shall be charged thereon."

In 1302 (Y. B. 30 Edw. I. 228), in a similar dispute, Brumpton, J., said to the defendants, charged as owners in common with others, and setting up that the others, a husband and wife, held as the wife's dower: "Nothing shall be entered on the roll but this, viz: that you do not hold in common. But state this by way of information and evidence to the inquest." The Year Books of Henry VI., a century and a half later, are full of discussions over this matter. The judges used a large discretion as to entering



on the record evidence, *i.e.*, explanatory and probative allegations, and they give as a reason for entering it, the danger that the jury will go wrong, from not apprehending the facts and from not separating facts from law. Once entered on the record, there could be no doubt of its being brought to the jury's knowledge; and in case of an attaint, it fixed them with notice of it. Observe how this is spoken of. In 1430 (Y. B. 9 H. VI. 63, 16), where, in an action of trespass, the defendant sought to plead specially, it was refused. "We pray," says counsel, "that all may be entered for evidence. Martin [J.], You have alleged only what you can give in evidence. Paston [J.], If this matter be not entered, the party is in danger of great mischief, for where one pleads merely not guilty, the jury has no regard to the place where the trespass is done; that is the common way of jurors. Martin [J.], We cannot adjudge the law according to the understanding of jurors. If they find him guilty of trespass in another county, clearly the attaint lies for the defendant." Only a little later (Y. B. 11 H. VI. 1, 2), in an action of waste, the defendant objected to the particularity of the declaration: "It has not until lately been the practice to count so, but generally. . . . Martin [J.]. It is a good practice, for if he counts generally and the other pleads *nul wast fait*, the laymen perhaps will find no waste." In 1436 (Y. B. 14 H. VI. 23, 67), in trespass, the defendant urged these same reasons for entering his special plea: Juyn (J.), "I will not say that we cannot enter all this matter,<sup>1</sup> but if we should it would bring great *comberance* to the court. If we do it in this case we must in all others; and if we should enter such things we shall not have clerks enough in this place." Only the general issue was entered. In the Year Book 19 H. VI. 21, 42, a valuable little note, or small treatise, on "Color" is preserved, in which the need of entering special matter is pointed out in order to prevent the laymen from passing on questions of law. This sort of discussion is constantly going on.

We are not, then, to suppose because witnesses were not in general called to testify to a jury, that therefore the jury did not receive any evidence. The original simple conception of them as a body of witnesses, who "tried" the case by their answer was,

---

<sup>1</sup> For the court's discretion as to this, see Brooke, Ab., Gen. Issue, 15.

as we see, always qualified and always undergoing more qualification. Great pains, to be sure, was taken in early times to require publicity as regards matters which might be the basis of legal right, and to fix rights by making them dependent on easily known facts; the endowing at the church door, the requirement, in case of curtesy, of hearing the child cry within the four walls, the sale before witnesses, and all the law about hue and cry, are instances. It will be remembered, then, that a jury from any neighborhood was a body of persons far more likely to be informed than such a body would probably be to-day.<sup>1</sup> See, for instance, what was expected of a defendant in 1306 (Y. B. 34 Edw. I. 122), who turned up at court a day late, and offered the excuse that he was hindered by a flood. He was first questioned as to where and when. He couldn't have got here any way, says the demandant's attorney. The tenant: "I travelled night and day. Mallore, J.: What did you do when you came to the water and could not pass? Did you raise the hue and cry and *mente*?"<sup>2</sup> For otherwise the country would have no knowledge of your hindrance. The tenant: No, sir, for I did not know so much law; but I cried out and halloed" (*Sire, nay, qe jeo ne savoye mie tant de ley, mes jeo triay e brayay*).

(i) The arrangements of the courts allowed of giving further information. As I have said, the explanatory, oral statements of the party or his counsel always contained the element of adding to what the jury already knew. As time went on this increased. We are to remember that the conception was that the jury in general knew the facts, and that they were able to judge of the truth of these conflicting statements.<sup>3</sup> In 1302 (Y. B. 30 Edw. I. 122-4), the jury gave their verdict; then Brumpton, J., says: "Tell us the damages. The assise: Ten shillings. Poleyn [counsel, breaking in]: There was a chest worth two marks, and other goods," etc. The judge warns the jury to be careful, for an attain lies (since 1275) for damages, as well as the matter in chief. But the jury repeat their finding. We see this process well in a full and valuable case of 1465, a trial at

<sup>1</sup> Palg. Com. i. 247-8.

<sup>2</sup> And so Britton, f. 20, in speaking of the hue-and-cry: *ouve la menee des corns a de bouches*. Nichols translates: "with the company of horns and voices."

<sup>3</sup> *Isti* [the jury] *omnia sciunt que testes deponere norunt*. Fortescue, De Laud. c. 26 (about 1470).

bar,<sup>1</sup> in an assise of novel disseisin. This case shows us witnesses testifying openly to the jury; that practice had come in now. And it also shows us the counsel putting in evidence freely by mere allegations to the jury. Littleton, Fairfax, and others, serjeants, make a long narrative for the plaintiff. Yong does the same for the defendant. Sometimes a witness is called, and examined by the court. Sometimes he is only referred to as being present and ready to testify. Sometimes a document is put in. But mainly the statements of counsel are put forward as being in themselves evidence. It is interesting to notice that the judges suggested to the defendant's counsel discharging the inquest and demurring upon the evidence, then, probably, a pretty new thing in pleading; the plaintiff's counsel were ready for this, but the others declined; and the defendants afterwards lost by the jury's verdict. If they had demurred to the evidence they would have demurred to the allegations. A century later, in 1571,<sup>2</sup> in a famous demurrer upon evidence in an assise of novel disseisin, there is a long set of recitals of what William Bendloe, the plaintiff's serjeant, "said in evidence," and "gave in evidence," and "showed in evidence;" and then the defendants say that "the evidence and allegations aforesaid are insufficient in law," etc. And so, two centuries later, in *Cocksedge v. Fanshawe*.<sup>3</sup> In the great case of *Gibson v. Hunter*, in 1793,<sup>4</sup> in which the demurrer upon evidence, as a workable part of legal machinery in England, came to an end, after its life of about three centuries and a half, we find a note by the reporter seeking to reconcile this case with *Cocksedge v. Fanshawe*; the record in that case, it is said, "is agreeable to the ancient mode adopted in demurrers to evidence, in which it was usual to enter both the allegations of counsel in favor of the party offering the evidence and the evidence itself on the record, and to demur as well to the allegations as the evidence." This note is only wrong in its intimation that the allegations in former times were in any way a thing different from the "evidence." They appear to have been a leading and well recognized kind of evidence.

<sup>1</sup> *Babington v. Venor*, Long Quint (5 Edw. IV.) 58.

<sup>2</sup> *Newis v. Lark*, Plow. 403, 407. This form, with others, is given in *Rastell's Entries*, 318-319 a.

<sup>3</sup> Doug. 119 (1779).

<sup>4</sup> 2 H. Bl. 187, 209-11.

(j) But not yet have I spoken of the method of informing the jury by witnesses testifying publicly in court. Always, as we see, there had been, in some cases, a mingling of the jury with witnesses in their private deliberations. Why did they not have more help of this sort? It is evident that sending out witnesses with the jury to testify to them, if they were such as either party should choose to call, might readily be abused; it would lend itself easily to irregular and corrupting influences. If such witnesses were to be used at all, one would guess that their communications would come in like those made by the respective parties or counsel in their addresses to the jury; they would have the character of statements confirmatory of these and supplementary, and like them would be publicly made in court. And that seems to have been the course of the development. I know of no reason to suppose that a party's casual witnesses<sup>1</sup> were originally sent out with the jury. There was legal process for the document-witness and others of the preconstituted class, but none for the other. How and when did this great change come about? No one as yet can tell with exactness. Let me mention a few things that may help in tracing the matter.

In 1354 we find among the Parliament Rolls a striking petition, of which an explanation may perhaps be found in a case of the year 1353 (Lib. Ass. 134, 12). Several persons, including one of the justices, had been accused of conspiracy in indicting J. as a felon, who was acquitted. H. answered that he was a justice at the sessions, and bound to inform the jury for the king to the best of his ability. Four others said that they were indictors. Another one said that when the indicting jurors made their oath (*quand les jurors sur l'enditement fir. serment*) he was sworn to inform them. This one was driven to plead not guilty; and all the others did the same. The king's counsel only wished a verdict as to two, and these (both of the last class) were found guilty. The justice seems to have pleaded *nolo contendere*, and the indictors were held excused. It may well have been this and like cases that led to a petition<sup>2</sup> to the king and council, in 1354, reciting the false and malicious charging of people with conspiracy and maintenance, and irregular

<sup>1</sup> To use Bentham's convenient phrase for the ordinary witness as distinguished from the "preappointed" one.

<sup>2</sup> Parl. Rolls, ii. 259, col. 2.

practices in procuring juries, both of accusation and trial, and praying for the correction of these evils,—“that hereafter when any people are at issue and the inquest is charged and sworn, all evidence which is to be said (*totes evidences que sont a dire*) be openly said at the bar, so that after the inquest departs with its charge, no justice or other person have conference (*parlance*) with them to move or procure the said inquest, but that they say the fact upon their own peril and oath.” This petition was granted. It seems to promise a public offering at the bar of whatever evidence was to be given. But, observe, it does not inform us that, in fact, any other evidence was as yet given except such as we have heretofore considered.

But further consideration of this matter, and much else, must be crowded into a final article in the next number of the REVIEW.

*James B. Thayer.*

CAMBRIDGE.

[To be concluded.]

## THE SUGAR BOUNTIES.

IT is difficult to avoid the conclusion that, whatever be the decision of the Supreme Court in the recent cases on the "McKinley Bill," it will have as far-reaching an influence as any since *Dred Scott's*. The cases<sup>1</sup> are ordinary importers' appeals from duties illegally assessed. One is a sample of both. Take No. 1050. The plaintiffs, Sternbach & Co., on October 7, 1890, entered at the port of New York certain colored cotton goods of a number of threads to the inch and a valuation such that under the Act of March 3, 1883 (22 Stats. at Large, 488), they would have been dutiable at 40 per cent. *ad valorem*. Under the Act of October 1, 1890 (26 Stats. at Large, 567, 591), the duty of 45 per cent. was assessed and paid on these goods. The grounds of appeal all involve the same point — that the Statute of 1883 is still in full force and not repealed by the subsequent Act of 1890, for the short reason that the latter is void.

The reasons alleged in the various stages of the appeal are three. (1.) The Act signed by the President as the Act of October 1, 1890, was not the Act which passed the two Houses of Congress, and therefore was not enacted in conformity with the provision of the Constitution (Const. U. S., art. 1, sec. 7, cl. 3). (2.) The Act in its so-called "Reciprocity Clause" purports to authorize the President to reimpose taxes upon certain articles under circumstances amounting to a delegation of legislative functions to the executive. (3.) It provides for the payment from the Treasury of bounties to the producers of domestic sugar.<sup>2</sup>

Each of these three grounds of objection opens up an inviting field for investigation. Of the three, the last seems of greatest importance, in that it indicates a marked and persistent

<sup>1</sup> No. 1049, *Robert M. Boyd et al. v. United States*; No. 1050, *Charles Sternbach et al. v. United States*; represented respectively by Currie, Smith & Mackie and Messrs. Stanley, Clarke & Smith, both of New York.

<sup>2</sup> A fourth case, No. 1061, *U. S. v. Ballin, Joseph & Co.*, also represented by Messrs. Stanley, Clarke & Smith, is based largely upon the alleged legal inability of Speaker Reed to count a quorum among members of the House of Representatives who declined to respond to the roll-call, during the passage of that section of the McKinley Bill involved in the appeals.

tendency in recent legislation. The decision of its legality will naturally check or vastly increase its force and velocity.

Apparently the first two grounds of the importers' protest, however well founded in fact or law, are, to a certain extent, of a transient or accidental nature. Not so the question of the constitutionality of sugar bounties, first provided for in this bill. The sections of the Act of October, 1, 1890, relating to this subject read substantially as follows :

That on and after July first, eighteen hundred and ninety-one, and until July first, nineteen hundred and five, there shall be paid, from any moneys in the Treasury not otherwise appropriated, under the provisions of section three thousand six hundred and eighty-nine of the Revised Statutes, to the producer of sugar testing not less than ninety degrees by the polariscope, from beets, sorghum, or sugar-cane grown within the United States, or from maple sap produced within the United States, a bounty of two cents per pound; and upon such sugar testing less than ninety degrees by the polariscope, and not less than eighty degrees, a bounty of one and three-fourths cents per pound, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.<sup>1</sup> And for the payment of these bounties the Secretary of the Treasury is authorized to draw warrants on the Treasurer of the United States for such sums as shall be necessary, which sums shall be certified to him by the Commissioner of Internal Revenue, by whom the bounties shall be disbursed, and no bounty shall be allowed or paid to any person licensed as aforesaid in any one year upon any quantity of sugar less than five hundred pounds.<sup>2</sup>

Certain things may be noted on the surface of these sections.

*First.* The subject-matter is *taxation*.

As the able government brief (by Attorney-General W. H. H. Miller and Solicitor-General William H. Taft) puts it (p. 65) :

It may be conceded that the bounty must be paid out of the Treasury of the United States from funds raised by taxation and therefore that, unless Congress has power to levy a tax for the purpose of paying the bounty, an appropriation for a bounty is beyond its power.

*Second.* Individuals are the sole direct recipients of the taxation. The money goes from the taxpayer, through the Treasury, directly to the sugar-raiser, to increase his profits.

The government's attorneys say :

The sugar-bounty clause was for the purpose of encouraging the production of raw sugar in this country (p. 59). It will be noted also

<sup>1</sup> Schedule E, 231.

<sup>2</sup> Schedule E, 235.

that the sugar bounty is not payable to any particular individuals, but that to any one who may care to invest the time and capital in the growing and manufacture of raw sugar the offer of the government is open. . . . As will be seen from the records of the Internal Revenue Bureau, the number of applicants for bounty under this law is about five thousand, and they are distributed over twenty-four States (p. 72).

It may be assumed that (apart from its previous revenue conditions as a "protected" article) the industry of raising raw sugar differs in no essential particular from any of the other innumerable industries in the country. The question fairly raised on this branch of these cases therefore is this: Has Congress the constitutional power to tax the people of the United States for the purpose of raising money with the direct object of giving it away to persons engaged in a particular industry, in order to encourage them to continue or expand it?

Let us take this as a subject for brief examination.

In looking over the field, the inquiry seems naturally to divide itself into three questions:

- I. For what purposes is taxation legal?
- II. How have these purposes been defined?
- III. Does the Federal Constitution confer on Congress additional powers?

#### I.

##### PURPOSES OF TAXATION.

They are easily stated. Taxation can only be for a "public purpose." Judge Cooley (*Law of Taxation*, p. 55) lays it down that

It is the first requisite of lawful taxation that the purpose for which it is laid shall be a public purpose.

Again (*Ibid.*, p. 103):

It is implied in all definitions of taxation that taxes can be levied for public purposes only. Differences of opinion frequently arise concerning the power to impose taxation in particular cases, but all writers who treat the subject theoretically and all jurists agree in the fundamental requirement that the purpose shall be public, and they differ, when they differ at all, upon the question whether the particular purpose proposed is within the requirement.

There is, of course, abundant authority for this elementary proposition.



In an early Pennsylvania case<sup>1</sup> it is said that

The common mind everywhere has taken in the understanding that taxes are a public imposition, levied by authority of the government, for the purpose of carrying on the government in all its machinery and operations; that they are imposed for a public purpose.

We have established, we think beyond cavil that there can be no lawful tax which is not laid for a public purpose. (*Loan Association v. Topeka*, 20 Wall., at p. 664.)

Taxation, by the very meaning of the term, implies the raising of money for public uses, and excludes the raising if for private objects and purposes. (*Allen v. Inhabitants of Jay*, 60 Maine, 124, 127.)

A tax is an impost levied by authority of government upon its citizens or subjects for the support of the State. (*Camden v. Allen*, 2 Dutch. 398.)

No authority nor, as I believe, even dictum can be found which asserts that there can be any legitimate taxation where the money to be raised does not go into the public treasury, or is not destined for the use of the government or some of the public governmental divisions of the State. (*Hanson v. Vernon*, 27 Iowa, 28, 47.)

Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them. (*Sharpless v. Mayor*, 21 Pa. St. 147, 169.)<sup>2</sup>

It may be remarked, parenthetically, that the importance of some such limitation upon the government's right to tax as that the purpose of taxation should be public cannot be overestimated. The whole fabric of society, as at present constituted, rests upon the private ownership of property. In other words, it is fundamental that what a man earns or lawfully acquires is his property, and that among the objects of the law is that of protecting him in this ownership. In society organized upon socialistic or nationalistic principles, all property is at the disposal of the government. There is no private property. So long, however, as our present society continues to exist, at its basis lies the institution of private ownership. Government has, for certain purposes and by certain methods, including that of taxation, the right to take from the citizen, against his will, a portion of his property. If this right were unlimited, the citizen would hold property not

<sup>1</sup> *Northern Liberties v. St. John's Church*. 13 Pa. St. 104, per Coulter, J.

<sup>2</sup> *Norris v. Waco*, 57 Tex. 635, 640; *In matter of Market Street*, 49 Cal. 546; *Hooper v. Emery*, 14 Me. 375, *accord*.

under the protection of the government, but at its mercy. A society so constituted would differ in no essential particular either from socialism or despotism. Indeed, as has been said by Mr. Justice Miller (*Loan Association v. Topeka*, 20 Wall., at p. 662):

It must be conceded that there are such rights in every free government, beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic repository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.<sup>1</sup>

## II.

### "PUBLIC PURPOSE."

In general, there is little difficulty in deciding what purposes are public. In town or city affairs, "roads are made and kept in repair, school-houses are built and salaries paid to teachers, there are constables to take criminals to jail, there are engines for putting out fires, there are public libraries, town cemeteries, and poor-houses." In State affairs, courts are to be maintained, laws enacted and enforced, judges and State officials paid, jails and prisons maintained, etc. These are public purposes for the obvious reason that the public receives the direct and immediate benefit.

This is the first class of cases. All taxation, however, is not so free from the alloy of private interest. The lay-out of a thoroughfare, for example, may be most directly beneficial to certain individuals. Their lands are made accessible, or possibly for the first time brought into market. Cases are readily supposable where the advantage to individuals must greatly exceed the advantage accruing to the general public. But still the taxation is for a public object. The direct purpose of the expenditure is public—the lay-out of a highway. The general public enjoy legal rights in and advantages from the new street. The mere fact

<sup>1</sup> See, also, Sharswood, *Legal Ethics*, xix-xxii.

that incidentally certain particular members of the public receive therefrom private advantages not shared by their fellows cannot affect the propriety of the expenditure. Given a public object for which to tax, the extent and circumstances of any particular expenditure are matters of legislative discretion, and if exercised to the undue benefit of private persons the remedy is political.<sup>1</sup>

An easy illustration of this second class of cases is the grant of state or municipal aid to the construction of railroads. The entire contention has been as to whether the purpose was public. It has been urged, by those who took the affirmative of the proposition, that railroads are analogous to highways. It has been pointed out that the construction of a railroad is a sufficiently public purpose to enjoy the benefit of the State's power of eminent domain; that the obligation of a railroad is that of a common carrier, and so subject to rights on the part of the general public; that the tolls are subject to legislative control, and that railroads furnish means of communication essential to the public interest. It has been contended, and the contention has been largely accepted as correct,<sup>2</sup> that therefore, although, as the objectors allege, the direct recipient is an individual or corporation, and the public money therefore goes in the first instance to swell private profits, that still the essential object is, after all, a public one. It will be noted, however, that in the leading case of *Rogers v. Burlington* (2 Wall. 654) a strong minority (consisting of the Chief Justice and Field, Grier, and Miller, JJ.) dissented, and further that such a power of taxation has been steadily resisted in many well-considered cases.<sup>3</sup>

In *Loan Association v. Topeka* (20 Wall., at p. 662) it is said that "Of the disastrous consequences which have followed its recognition by the courts, and which were predicted when it was first established, there can be no doubt."

It is also notorious that many States have been forced to prohibit or restrict such loans in their subsequent constitutions.

It is generally thought, moreover, that in this class of cases the

<sup>1</sup> *Lowell v. Boston*, 111 Mass. 454; *People v. Salem*, 20 Mich. 452.

<sup>2</sup> *Rogers v. Burlington*, 3 Wall. 654; *Queensbury v. Culver*, 19 Wall. 83; *Taylor v. Ypsilanti*, 105 U. S. 60; *Sharpless v. Mayor*, 21 Pa. St. 147; *Olcott v. Supervisors*, 16 Wall. 678; *R.R. Co. v. Davidson*, 1 Sneed, 637; *Opinion of Justices*, 58 Me. 590, 604.

<sup>3</sup> *Hanson v. Vernon*, 27 Iowa, 28; *Whiting v. R.R.*, 25 Wise, 166; *People v. Salem*, 20 Mich. 452; *People v. Treasurer*, 23 Mich. 499; see, also, *Jenkins v. Andover*, 103 Mass. 94; *Talbot v. Hudson*, 16 Gray, 417.

legislature has been permitted to go to the extreme limit of the law, and all these decisions have clearly recognized the principle that taxation can only be for a public purpose.

The difficult case is neither that of a public expenditure for the equal general benefit, nor of a public expenditure with incidental private advantage, but that of an expenditure for the direct benefit of individuals with an incidental public gain. In other words, it is not the case of the highway for the general good, nor of one owned and enjoyed by the public while incidentally affording exceptional private benefit. It is, as it were, building private avenues at public expense, from which individuals directly benefited exclude the public, in order that the public may derive incidental advantage from the increased prosperity of the individuals benefited, through their enhanced ability to pay wages or taxes upon increased valuations.<sup>1</sup> Cases, indeed, may be supposed in which this incidental public gain is actual, and productive of immense general advantage; an advantage sufficiently great to make the original investment of public money profitable, in the business sense. Apparently, it is this class of cases which we are considering in these sugar bounties. Is such an expenditure for a "public purpose"?

This question the uniform current of authority in State and Federal courts has answered in the negative. As relates to State governments, tax appropriations for the direct benefit of individuals to reach an incidental public advantage are beyond the legislative power. Whether the same rule applies to Congress will be considered later. But in State affairs, wherever the incessant activity of those who ask direct private gain under promise of indirect public advantage is incorporated into legislation, such legislation is void. Under any of its Protean forms, however disguised, if it can be detected that an application has been made of public moneys for the primary benefit of individuals, courts have shown themselves astute in following and defeating the substance of the arrangement.

The language of these cases is free from ambiguity. They are familiar, but worthy of review. In citing them we avail ourselves of the careful summaries contained in the briefs of the importers' counsel. In Massachusetts a well-considered opinion is that given in the leading case of *Lowell v. Boston* (111 Mass. 454).

---

<sup>1</sup> See *Morse v. Stocker*, 1 All. 150.

By Statute 1872, chap. 364, the city of Boston was authorized, at a session of the legislature called largely for that purpose, to issue bonds to the amount of \$20,000,000, the proceeds to be loaned to persons whose property had been destroyed by the great Boston fire, under conditions carefully conceived for the security of the loan.

The situation is graphically described in the argument of the eminent counsel for the city (Hon. B. R. Curtis and J. G. Abbott, Esqs.):

The main questions in the case are these: Can there be such a destruction of property by fire in the capital city of the State, the main seat and centre of its wealth, industry, commerce and business, the prosperity and advance of which are so intimately connected with its own, that the one cannot be touched without seriously affecting the other, as to justify the State in lending money to those whose property has been destroyed, upon ample security, to enable them to restore the city to its former condition? Can there be so general a calamity and destruction by fire, in a city owning more than a third of the taxable property of the State, and paying more than a third of the taxes for public purposes, as would justify the State, upon prudential considerations, in lending a helping hand for the purpose of preserving her own resources and the mainsprings of her own prosperity? Can there be a destruction of property in such a city, by fire, so serious and calamitous as to interfere with the business of the people, the interests of labor, and the finances of the whole community, to such a degree as to justify the legislature in bringing to the aid of the sufferers a loan from the State, to avert some, at least, of the great public loss and suffering that would be occasioned by such a calamity?

The Act, nevertheless, was held unconstitutional. The court hold:

The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interest of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax,

and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

The principle of this distinction is fundamental. It underlies all government that is based upon reason rather than upon force. . . . An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway, is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and entrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation.<sup>1</sup>

Substantially the same state of facts arose after the Charleston (S. C.) fire, and a similar statute was declared unconstitutional. (Feldman *et al v.* City Council, 23 S. C. 57.)

In Maine, the same proposition has been laid down. The Supreme Court of that State were asked by the House of Representatives for their opinion on this question :

Has the legislature authority under the constitution to pass laws enabling towns, by gifts of money or loans of bonds, to assist individuals or corporations to establish or carry on manufacturing of various kinds within or without the limits of said towns? And if towns thus authorized may assist private parties, may they go further and establish manufactories entirely on their own account, and run them by the ordinary town officers or otherwise?

In answering in the negative, the court (Opinion of Justices, 58 Me. 590) use the following language :

Individuals and corporations embark in manufactures for the purpose of personal and corporate gain. Their purposes and objects are precisely the same as those of the farmer, the mechanic, or the day laborer. They engage in the selected branch of manufactures for the purpose and with the hope and expectation, not of loss, but of profit. The general benefit to the community resulting from every description of well-directed labor is of the same character, whatever may be the

<sup>1</sup> *Atty. Gen. v. Boston*, 123 Mass. 460, 470; *Agawam v. Hampden*, 130 Mass. 528; *Opinion of Justices*, 150 Mass. 592, *accord*.

branch of industry upon which it is expended. All useful laborers, no matter what the field of labor, serve the State by increasing the aggregate of its products—its wealth. There is nothing of a public nature any more entitling the manufacturer to public gifts than the sailor, the mechanic, the lumberman, or the farmer.

The State cannot rightfully discriminate among occupations, for a discrimination in favor of one branch of industry is a discrimination adverse to all other branches. The State is equally to protect all, giving no undue advantages or special or exclusive preferences to any. (p. 593.)

Can a tax be constitutionally imposed by municipal corporations to load the tables of the few with bounty that the many may partake of the crumbs that fall therefrom? (p. 603.)

In *Allen v. Jay* (60 Me. 124), the facts were that the town of Jay had in its town meeting voted to loan \$10,000 to a firm of manufacturers, on condition that they would move their works to Jay and establish and maintain them there for ten years, the town to be repaid and the loan to be amply secured by a mortgage on the mill property. This vote was ratified by an Act of the legislature (1871, chap. 716). In declaring the Act void, the court (per Appleton, C. J.) state the proposition thus :

Ultimately, it will be found that the question resolves itself into an inquiry whether the legislature can constitutionally authorize the majority of a town to loan their own and the money of a minority raised by taxation and against the will of such minority, as such majority may determine. . . . (p. 127.) While the State is bound to protect all, it ceases to give that just protection when it affords undue advantages, or gives special and exclusive preferences to particular individuals and particular and special industries at the cost and charge of the rest of the community. . . . (p. 130.) The alleged justification for raising money to be loaned to private individuals for their own profit arises from the supposed public benefit to be made of the money so loaned. But the moment the loan is effected, the bonds and money raised from their sale become the bonds and money of the person borrowing, and subject to his control. . . . (p. 131.) Whether the estates of citizens are to be placed in the public treasury for the purpose of dividing them, or of loaning them to those who have not accumulated them, matters not. In either case, the owner is despoiled of his estate, and his savings are confiscated. If the loan be made to one or more for a particular object, it is favoritism. It is a discrimination in favor of the particular individual, and a particular industry, thereby aided, and is one adverse to and against all individuals, all industries, not thus aided. If it is to be loaned at all, then it is practically a division of property under the name of a loan. It is communism incipient, if not perfected. . . . (p. 132.)

The acquisition, possession, and protection of property are among the chief ends of government. To take directly or indirectly the property of individuals to loan to others for purposes of private gain and speculation against the consent of those whose money is thus loaned,

would be to withdraw it from the protection of the Constitution and submit it to the will of an irresponsible majority. It would be robbery and spoliation of those whose estates, in whole or in part, are thus confiscated. No surer or more effective method could be devised to deter from accumulation—to diminish capital, to render property insecure, and thus to paralyze industry. (p. 142.)

The same rule obtains in New York. In *Weismer v. Douglas* (64 N. Y. 91), for example, the court held void an Act of the legislature authorizing the village of Douglas to take stock in a manufacturing corporation, and to issue bonds to raise the money to pay for such subscription, and to levy and collect taxes for the payment of the principal and interest on said bonds. To the contention that this was a public purpose, in that the growth of the community would be advanced by manufacturing prosperity, the court (Folger, J.) say:

It may also be conceded that that is a public purpose, from the attainment of which will flow some benefit or convenience to the public, whether of the whole commonwealth or of a circumscribed community. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right.<sup>1</sup>

In the case of *Sweet v. Hulbert* (51 Barb. 316), Judge James, in speaking of such an attempt, holds as follows:

If this can be done, it is legal robbery; less respectable than highway robbery, in this, that the perpetrator of the latter assumes the danger and infamy of the act, while this act has the shield of legislative irresponsibility.

In Michigan, similar results are arrived at. An incidental treatment of the "bounty" question by Judge Cooley (*People v. Salem*, 20 Mich. 452) is interesting in this connection (p. 486):

In the course of the argument of this case allusion was made to the power of the State to pay bounties. But it is not in the power of the State, in my opinion, under the name of a bounty or under any other cover or subterfuge, to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it. A bounty law of which this is the real nature is void, whatever may be the pretence on which it may be enacted. The right to hold out pecuniary inducements to the faithful performance of public duty in dangerous or responsible positions, stands upon a different footing altogether; nor have I any occasion to question the right to pay

---

<sup>1</sup> Matter of application, 96 N. Y. 42; *Sweet v. Hulbert*, 51 Barb. 316, *accord*.



rewards for the destruction of wild beasts and other public pests ; a provision of this character being a mere police regulation. But the discrimination by the State between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in State government. When the door is once opened to it, there is no line at which we can stop and say with confidence that thus far we may go with safety and propriety, and no further. Every honest employment is honorable ; it is beneficial to the public ; it deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the State to make discriminations in favor of one class against another, or in favor of one employment against another. The State can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws. It cannot compel an unwilling minority to submit to taxation in order that it may keep upon its feet any business that cannot stand alone. Moreover, it is not a weak interest only that can give plausible reasons for public aid ; when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger.

The Wisconsin cases adopt the same view. In *Attorney-General v. Eau Claire* (37 Wis. 400), the facts were similar. An Act had been passed by the legislature authorizing the Common Council of the city of Eau Claire to construct a dam across the Chippewa river, and lease the same for private purposes, and to issue bonds to pay for the same. The Act was held unconstitutional. The court say :

We cannot hesitate in holding, what was not questioned at the bar, that, if the statute under consideration grant power to the city to construct and maintain the dam for the purpose of leasing the water-power for manufacturing purposes, it is a power for a private and not a public use, and cannot be upheld.<sup>1</sup>

The courts of Kansas are in accord. In *State v. Osawkee* (14 Kan. 418), the court was called to pass upon the validity of an Act (Stat. Kan., 1875, ch. 42) authorizing townships to issue bonds to provide the destitute citizens of certain townships with provisions and with grain for seed and feed. The act was called forth by a failure of the crops, partial or total, in many parts of the State, and entailing great suffering. The statute was held unconstitutional. Mr. Justice Brewer says :

<sup>1</sup> *Curtis v. Whipple*, 24 Wis. 350; *Mather v. Ottawa*, 114 Ill. 659; *Coates v. Campbell*, 37 Minn. 498, *accord*.

The credit of the township is invoked to procure funds for the accommodation of a single class temporarily and through unexpected calamity embarrassed in the prosecution of its ordinary business. Can this be called a public purpose? Clearly not. It would doubtless relieve the temporary wants of that class, would enable it to enter upon the business of the year with increased hope and a reasonable expectation of ordinary success in that business, and thus indirectly result in great benefit to the general public. But a similar result would follow the success and prosperity of any other class in business. And if the principle be once recognized in its application to this class, who can tell how soon it may be invoked in aid of another? If one hundred farmers may receive seventy-five dollars each to assist them in their farming, why may not one hundred mechanics with equal propriety receive seventy-five dollars each to assist them in their business, or a single manufacturer who employs one hundred hands receive seventy-five hundred dollars to assist him in his manufacturing? A difference in amount makes no difference in the principle.

The same point was decided the same way in the case of *Railroad Co. v. Smith* (23 Kan. 745), where the court were called to pass upon the validity of a statute (Laws of 1873, ch. 51) authorizing Blue Rapids township to take stock in and issue bonds to the Irving Manufacturing Company, a corporation then organized, whose purpose, as expressed in its charter, was to purchase all needed lands, and construct and maintain a dam across the Big Blue river, within two miles of Irving, and build and maintain mills and their machinery for manufacturing purposes. The Act was held unconstitutional.

The court, through Mr. Justice Brewer, says (page 755) :

Public aid to private purposes cannot be secured by yoking them to a public purpose. And where the public and private purposes are attempted to be aided by a single concession, the latter vitiate, rather than the former uphold the grant.<sup>1</sup>

The decisions of the federal courts on this point are to the same effect. In 1873 the question came before Mr. Justice Dillon, in the Eighth Circuit, in the case of *Commercial Bank v. City of Iola* (2 Dill. Circ. Ct. Repts. 353). An Act of the legislature of Iowa purported to authorize the city of Iola to appropriate \$50,000 to aid in the erection of buildings at or near the city of Iola, to be used for the purpose of manufacturing bridges,

---

<sup>1</sup> But see *Burlington v. Beasley*, 94 U. S. 310, where taxation in aid of a public grist-mill, the tolls of which the legislature would have a right to regulate, was sustained. Possibly in a new country such a mill would be a public necessity analogous to a railroad, and impossible without public aid.

plows and stoves, and for that purpose to issue bonds and levy taxes to pay the principal and interest of the bonds. The Act was adjudged unconstitutional. In the course of a well-considered opinion, Judge Dillon says :

Taxation to aid ordinary manufactories or the establishment of private enterprises is a device until recently quite unheard of, and the power must be denied to exist unless all limits to the appropriation of private property and to the power to tax be disregarded. The question under discussion must be determined upon some principle, and I hold it to be sound doctrine that the mere incidental benefits to the public or the State which result from the pursuit by individuals of ordinary branches of business or industry do not constitute a public use in a sense which justifies the exercise of either the power of eminent domain or of taxation.

If this salutary principle be abandoned, we unsettle the foundations of private property, and unwisely open the door for frauds and abuses of the most alarming character.

Perhaps the most weighty (certainly the most quoted ) opinions on this subject have been given in the Supreme Court itself. A classic in this branch of the law is the *Loan Association v. Topeka* (20 Wall. 655). In that case the legislature of Kansas had passed an Act purporting to "authorize cities and counties to issue bonds for the purpose of building bridges, aiding railroads, water power and other works of internal improvement." Under this Act the City of Topeka issued one hundred bonds for \$1,000 each, and gave them as a donation to a company for the manufacture of iron bridges, "to encourage that company in its design of establishing a manufactory of iron bridges in that city." Mr. Justice Miller, in delivering the substantially unanimous opinion of the court that the Act was void, expressed himself with sufficient clearness to justify, it is hoped, the following extract :

The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of the governments are all of limited and defined powers. There are limitations on such powers which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or object for which taxation may lawfully be used, and the extent of its exercise is in its nature unlimited. It is true that express limitation on the amount of tax to be levied on the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of gov-

ernment, the prosecution of war, the national defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government. The power to tax is, therefore, the strongest, the most pervading, of all the powers of government, reaching directly or indirectly to all classes of the people. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it on favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat-owner, are equally the promoters of the public good and equally deserving the aid of the citizen by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

The later cases in the United States courts adopt the same view of the law. In *Parkersburg v. Brown* (106 U. S. 487), an Act had been passed by the legislature of West Virginia authorizing and empowering the authorities of the city of Parkersburg to issue bonds for the purpose of lending the same to manufacturers carrying on business in or near said city. This court held the Act void, saying, per Mr. Justice Blatchford:

But we are of the opinion that, within the principles decided by this court in the case of *Loan Association v. Topeka*, 20 Wall. 655, the bonds in question here are void. The Act of 1868 authorizes the bonds to be issued as the bonds of the city. The principal and interest are to be paid by the city. The bonds are to be lent to persons engaged in manufacturing. . . . It is taxation which takes the private property of one person for the private use of another person.

In *Cole v. LaGrange*, 113 U. S. 1, the case turned on an Act passed by the legislature of Missouri authorizing the city of LaGrange, whenever two-thirds of the resident taxpayers signified their approval thereof at a special election, to levy a tax not exceeding two per cent. per annum on the assessed valuation of the real and personal property in the city, to pay for a donation or

subscription to the stock of a railroad or manufacturing company. The court held the Act void. The opinion, written by Mr. Justice Gray, of Massachusetts, uses the following language :

The general grant of legislative power in the Constitution of the State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject. . . . We have been referred to no opposing decision.<sup>1</sup>

There seems, as stated in the last case, no authority to the contrary. Indeed, as is said in the *Topeka* case (20 Wall., at p. 664), the proposition — that taxation can only be for a public object, and that where the direct and primary benefit goes to an individual any incidental public advantage from the existence or prosperity of this individual or his industry cannot make such taxation for a public object — is really settled by the meaning of words, by a resort to the dictionary. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government *for the use of the Nation or State*." It seems clear, therefore, that were the sugar bounties matter of State legislation, they would be unconstitutional under the unanimous weight of American authority. If the judicial reserve of courts of last resort in important States is so far shocked by a concealed and guarded benefit to an individual or industry from the general tax-fund as to force the use of such ugly words as "robbery," "despotism," "confiscation," "spoliation," "usurpation," "communism," "plunder," "favoritism," etc., it can hardly be supposed that so bald an arrangement as a bounty would be considered an exception to the rule.<sup>2</sup>

<sup>1</sup> Same case, 19 Fed. Rep. 871.

<sup>2</sup> *Bissell v. City*, 64 Ill. 249; *English v. People*, 96 Ill. 566; *State v. Foley*, 30 Minn. 350; *Curtis v. Whipple*, 24 Wis. 350; *Brick Co. v. Brewer*, 62 Me. 62; *Iron Works v. Moundsville*, 11 W. Va. 1; *Trustees of Brooke Academy v. George*, 14 W. Va. 411, 425; *McConnell v. Hamm*, 16 Kan. 228, *accord*.

## III.

## POWERS OF CONGRESS.

We have largely heretofore been repeating the position of the importers' counsel. It is time to examine the contention of the government on this branch of its case.

Briefly stated, the defence of the government rests upon four contentions :

1. Congress has power to levy taxes for the "general welfare."
2. The State authorities have no application.
3. Congress has exercised similar powers for many years without objection.
4. Congress has given the benefits of "protection" to certain industries, including sugar-raising, and fairness requires an equal bounty to the beneficiary upon the removal of the tax.

1. "*General Welfare*" Clause.

Section 8 of Article I. of the Constitution provides that

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and *general welfare* of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

This has been interpreted to mean that the power of taxation is limited to the purposes of paying the debts and providing for the common defence and general welfare of the United States.<sup>1</sup> The attorney-general, after citing this provision, continues (p. 65) :

Congress has power, therefore, to levy duties for the purpose of providing for the general welfare of the United States. Is the provision for the payment of bounty to sugar-producers, above set forth, "for the general welfare" ?

If this is the issue in the case, the importers are at once out of court. If, as this position apparently assumes, Congress has power to expend taxes for anything which, in its judgment, is "for the general welfare," then the court will assuredly not attempt to control the specific exercise of that power in any given case. Granted a power, the propriety of its exercise is obviously of legislative concern.<sup>2</sup> If Congress, on the contrary, as the importers

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 199; *Miller, Const.*, p. 231; 1 *Story, Const.*, § 927.

<sup>2</sup> *Talbot v. Hudson*, 16 Gray, 417, 421.

claim, can only spend or raise taxes for a public purpose, the court may reasonably be called upon to pass upon the public nature of the purpose in this case. It at once follows from the attorney-general's position in its unqualified form that there is practically no limitation whatever upon the constitutional power of Congress to raise and appropriate taxes. Clearly the limitation, if any, is that claimed by the importers. The power is either unlimited or it is limited by the requirement that the taxation must be for a public purpose. What other can there be?

Certainly, there is no more constitutional authority for paying men to tap a maple and boil its sap, or to raise cane, than there is to raise hay, potatoes, corn, or cabbage. If the taxes constituting the funds in the national treasury can be collected and disbursed to compensate a man for making sugar, they can be for making brick or any other manufacture. There can be, in such case, no limit to the extent to which monies raised by taxation can be appropriated to the individual benefit of preferred citizens, and in the encouragement of their private enterprises, and to their personal gains.<sup>1</sup>

This case is largely one of first impression, but we are not left without landmarks. It is certain that the attorney-general's contention, in this broad form, is not in accordance with recognized authority. The power to tax "for the general welfare" is not unlimited. Judge Story (1 Story, Const., § 990) asks and answers this precise question.

Have Congress a right to raise and appropriate the public money to any and to every purpose according to their will and pleasure? *They certainly have not.*

In the Topeka case (20 Wall., p. 663, top) Mr. Justice Miller, it will be noted, declares, as to this taxing power, that

The theory of our governments, *State and National*, is opposed to the deposit of unlimited power anywhere.

In his lectures, the same jurist has amplified the idea that the federal power of taxation, instead of being free from limitations imposed upon State taxation, is really much more circumscribed than that of the States :

The general government can levy taxes, but they must be for a defined purpose, such as the payment of the public debt, or of the army

<sup>1</sup> Brief of Messrs. Stanley, Clarke, & Smith, p. 51. See also *Turner v. Nye, Mass. S. J. C.*, 28 N. E. Rep. 1048, 1050.

and navy of the United States. It has no right to raise money by taxation for religious purposes, or for a thousand things for which the State may impose taxes, and collect them of the people. (Lectures on Const., 104, 247.)

A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. (1 Story, Const., § 922.)

The power to lay taxes is a power exclusively given to raise revenue, and it can constitutionally be applied to no other purposes. The application for other purposes is an abuse of the power; and, in fact, however it may be in form disguised, is a premeditated usurpation of authority. (1 Story, Const., § 963.)

To Judge Story, the suggestion that this power to levy taxes for the general welfare was an unlimited one seemed entirely absurd.

To consider the latter phrase not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased. (1 Story, Const., § 926.)

It may be observed further that in several at least of the cases of State taxation, the State legislature was expressly empowered to legislate for "the general welfare."<sup>1</sup>

## 2. *State Authorities do not apply.*

It is clear that this is a necessary part of the government's contention. The ground for it appears on page 67 of the government's brief, and can perhaps best be stated by the attorney-general himself :

We respectfully submit that they (the State decisions) have no application to this controversy. They are all of them cases of municipal taxation, which must be for public municipal purposes. It is obvious that the establishment of a particular industry in one place by a bonus to specified private individuals is a very different object for taxation than the encouragement by the national government of a widespread industry in many quarters of the Union for national purposes, with a view to diversifying the industries of the country and making it independent of other countries for necessities.

<sup>1</sup> Const. Massachusetts, Pt. II. Ch. 1, Sec. 1, Art. 4; Const. Maine, Art. IV. Pt. 3, § 1; Const. New Hampshire, Pt. 1, Art. 31; Pt. 2, Art. 5; Const. of Georgia, Art. III. Sec. 7, § 22.



In support of this contention, the attorney-general quotes from Cooley on Taxation (2d ed., p. 108), as follows :

In considering the legality of the purpose of any particular tax, a question of first importance must always concern the grade of the government which assumes to levy it. The "public" that is concerned in a legal sense in any matter of government is the public the particular government has been provided for ; and the "public purpose" for which that government may tax is one which concerns its own people, and not some other people having a government of its own, for whose wants taxes are laid. There may, therefore, be a public purpose as regards the Federal Union, which would not be such as a basis for State taxation, and there may be a public purpose which would uphold State taxation, but not the taxation which its municipalities would be at liberty to vote and collect. . . . The grade of the government is also important for another reason. A municipal government is one of delegated and limited powers, whose authority will receive a somewhat strict construction, rendering it necessary that it shall find the purposes for which it may tax clearly and unmistakably confided to its charge by the State. . . . It is otherwise with the State, which *has all the power of taxation* not withheld from exercise in the making of the State and Federal Constitutions, and in support of whose action, consequently, the most liberal intendments are to be made. It is otherwise with the Federal Union also ; for *though its powers are not general like those of the State*, but are limited and defined by the Federal Constitution, yet as they concern the most important matters of government, and relate to subjects not of domestic concern merely, but of international intercourse, and to other matters which sometimes call for broad and comprehensive views, and make a policy of liberal expenditures wise and statesmanlike, it would be neither reasonable nor prudent to subject its action in the matter of taxation to critical rules. That which it decides to be *an object of public expenditure* must generally be so accepted, and error in its action must be corrected by discussion and through public opinion and the elections.

The attorney-general rests this branch of his case upon the foregoing extracts. It seems by no means clear that they are altogether favorable to his view. It is pertinent to observe that the State authorities which are said to "have no application" are by no means "all of them cases of municipal taxation." It is true that the taxation in question was to be made by the machinery of towns, cities or counties. But, *in every instance*, the taxes were imposed under express authority of the States, which are said to have "all the power of taxation not withheld from exercise in the making of the State and Federal Constitutions."<sup>1</sup> It sufficiently appears, also, from the extracts in question, that, in the opinion of the writer, Federal taxation, like State taxation, must be for a

---

<sup>1</sup> See also U. S. v. Railroad, 17 Wall. 322, 329.

"public purpose," and further that, on account of the limited powers of the general government and the large "reserved powers" of the States, the number of the objects for which the State can tax is largely in excess of the fewer, though possibly more generally important, objects for which the federal government may do so.

Indeed, the proposition that federal taxation must be for a public purpose is substantially agreed to by the attorney-general in the very next paragraph of his brief (p. 69):

The difference between what constitutes a "public purpose" for a municipality *and for the government of the United States* is illustrated, etc.

If this be so, it is not perceived why the State authorities are not strictly applicable. These cases not only declare that all taxation is necessarily limited to "public purposes," but limit the meaning of that phrase by a broad and general definition; viz., that to confer direct pecuniary benefits upon an industry or individual for the sake of an incidental or resulting general advantage is not a "public purpose." The relation of the State courts to their State constitutions is substantially the same as that existing between the federal Supreme Court and Congress. And it is to be observed further that the State decisions frequently treat such legislation, independent of constitutions, as being *in violation of natural right*. There are limitations imposed upon the legislature "by the general principles supposed to limit all legislative power." (*Bartemeyer v. Iowa*, 18 Wall. 129, 132.) It would seem that natural rights must be the same, whether against legislation by Congress or by the legislature of the State.<sup>1</sup>

This is especially important in view of the fact that Congress can do nothing which the Constitution does not first sanction. If a power be denied to the State, *a fortiori* it may be presumed to have been denied to Congress.<sup>2</sup>

In defining the meaning of the limitation imposed upon the congressional power of taxation, viz., "public purpose," and in defining the natural rights of the citizen under any government, it seems difficult to avoid the force of the State decisions.

<sup>1</sup> *Calder v. Bull*, 3 Dall. 386; *Wilkinson v. Leland*, 2 Peters, 627, 657; *Gunn v. Barry*, 15 Wall. 610, 623; *Hammett v. Phila.*, 65 Pa. St. 146, 151.

<sup>2</sup> 1 Story, Const. § 909; *Calder v. Bull*, 3 Dall. 386; *U. S. v. Cruikshank*, 92 U. S. 542, 550, 551.

### 3. *Congressional Action.*

The contention that "public purpose" for the taxation by Congress means something different than the same phrase when applied to State taxation is sustained, in the opinion of the attorney-general, by instances in which Congress has expended moneys for bounties to people in this and other countries. The list is taken from a speech of Senator Daniel on the Blair Educational Bill (21 Cong. Record, pt. 3, 2295) in 1890. There are about forty instances cited, of which thirty-three are for the relief of sufferers by fire, earthquake, including one at Venezuela, Indian depredations, overflow of the Mississippi and Ohio rivers, cyclones, yellow fever, grasshoppers, lack of seed by failure of crops, or from accidents at arsenals.

Congress has also appropriated money to transport supplies to Ireland (9 Stats. at Large, 207; 21 *Ibid.* 303), to the South (14 Stats. at Large, 567; 15 *Ibid.* 24), to France and Germany (16 Stats. at Large, 596), usually in government vessels.

It will be observed that these are all matters of national charity, were not judicially examined or even seriously challenged in debate, and were never for large amounts. They were from funds already in the Treasury. The excellence of their objects, and the fact that no one in particular cared to, or could, bring the matter to the attention of the court, seem at least partially to explain these instances of national generosity. Logically considered, they tend to prove, so far as they prove anything, that the power of Congress to tax is absolutely unfettered. For example, to either a narrow or latitudinarian constructionist of the Constitution, it would be difficult to prove that taxation for sending food to sufferers by earthquake in Venezuela was for the "general welfare of the United States."

To these instances may perhaps be added the "codfish bounty" (1 Stats. at Large, 229), practically a drawback upon the duty on salt, and various other drawbacks under different revenue statutes.<sup>1</sup> It may be observed as an interesting fact that these Acts are frequent during periods of "protective" tariffs, as 1804-1847 or 1863-1890, while there are no instances of this sort of legislation in the period of "revenue tariff," between 1847 and 1861; and further

<sup>1</sup> See 6 Stats. at Large, 13; 1 Story, Const., § 991; 3 Hamilton's Works, p. 192; 3 Madison's Works, 636-648; 1 Stats. at Large, 387; 2 Stats. at Large, 84; 3 Stats. at Large, 36; 21 Cong. Record, p. 9592; 1 Stats. at Large, 27.

that the doctrine, which has never reached the court, has not been passed without challenge by the Executive on several occasions. In 1887, for example, when Congress passed an Act to distribute seeds to the drought-stricken counties of Texas, with an appropriation, the President vetoed it, assigning as a reason :

I can find no warrant for such an appropriation in the Constitution, and I do not believe that the power and duty of the general government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadfastly resisted, to the end that the lesson should be constantly enforced that, though the people support the government, the government should not support the people.

These instances of national charity relied on by the attorney-general, repay examination. They are thus characterized by the importers counsel at page 22 of their "Reply."

An exchange of lands ; the use of a national vessel ; slight extensions of existing debts ; small donations of food, or its purchase (in trifling amounts) from funds already in the public treasury, to be given to foreign or domestic sufferers by earthquake, flood, or fire, or to those to whom the grasshopper had become a burden—evading judicial scrutiny, they prove nothing as to the constitutionality of the present act.

#### 4. *Protective Taxes.*

The government say (p. 75) :

It is too late, in this year of grace 1891, for litigants to argue that the encouragement of diversified industries is not a national purpose, and, so far as Congress is concerned, therefore a public purpose. . . . We do not propose to spend further time in a discussion of their (*i.e.* of "protective" laws) validity. It is an issue long since finally settled. The principle thus established necessarily justifies bounties, for, in the beginning of the operation of a protective tariff, the amount of duty levied is a bounty to the domestic manufacturer, and it is with a view to such a benefit for him that it is levied. The sugar duties have always had the effect of a bounty to domestic sugar-producers. . . . The removal of duties would absolutely destroy fifty or sixty million dollars' worth of property invested in this industry and protected by the duties. To enable persons whose property would be thus injuriously affected to prepare for the change, the government was under a moral obligation to reimburse them for their loss, or to permit them by a bounty to continue the business until such time as the business might be self-sustaining. (p. 84.)

From the acquiescence of the nation during the periods of "protection" under the tariffs of 1789, 1812, 1816, 1824, 1828,

1842, and under the war tariffs of 1861, 1867, 1874, and 1883 (though the acquiescence has not been without periods of successful opposition), the attorney-general argues that indirect, *i.e.*, "protective," bounties are a "public purpose." (*Loan Association v. Topeka*, 20 Wall. 655, p. 664.) It may be conceded that the increases of price on domestic goods caused by a "protective" tariff are substantially a bounty to the domestic manufacturer, and that in case of a prohibitory tax the distinction between "protection" and "bounty" is extremely slight. But it may be noted that so good a constitutional authority as Madison (4 *Elliott's Debates*, 2 Phila. ed. 1876, 525, 526) held that a "protective" tariff was constitutional, and a bounty beyond the power of Congress. Judge Hare (1 *Const. Law*, 244) regards this as absurd, and suggests that

Whether money shall be raised by taxation and then laid out in bounties, or purchasers shall be compelled to pay a higher price to manufacturers than they would have to give abroad, would seem to be merely a question of form.

With all respect to the authority of Judge Hare, there seems reason to believe that Madison is right. In the case of the bounty, the direct object is a private benefaction. In the case of State statutes, this would be void; for the public benefit is strictly incidental. In the case of all "protective" taxes, the statute under which they are imposed is ostensibly to raise revenue.<sup>1</sup> Even the Act of October 1, 1890, called the "McKinley Bill," of which the Committee on Ways and Means in their report (Report No. 1466, Fifty-first Congress, first session) say, "The general policy of the bill is to foster and promote American production and diversification of American industry," styles itself "*An Act to reduce the revenue* and to equalize the duties upon imports, and for other purposes." The direct, apparent purpose of all these Acts is to raise revenue — an unquestioned public purpose. Any indirect bonus taken, by the arrangement of the schedules, from the consumers of certain articles, and transferred to their producers, is a purely incidental purpose. In adjusting its taxes, Congress is exercising an undoubted power. In so doing, it may benefit some industries and crush others. But these results are incidental, even if intentional, and the remedy, if any is needed,

---

<sup>1</sup> See, however, 1 *Stats. at Large*, 24.

is political. To impeach the constitutionality of a revenue statute which must make some incidental private benefits, on the ground that Congress has at the same time tried to do something else which is beyond its power, would be a hopeless task. But a bounty is perhaps a different matter. Here money is raised and directly given away to encourage private individuals to continue or increase their otherwise unprofitable business "until such time as the business might be self sustaining." Apparently, therefore, the question in the matter of bounties is not concluded by any previous acquiescence in "protective" taxes, even considering the latter as a colorable abuse of an unquestioned power.

This is, moreover, the first case in which the constitutionality of a congressional bounty, whether direct, as here, or indirectly by "protection," has been before the court for decision. Until the opportunity for raising the question is presented, until "an individual is brought into the point of collision, and the clouds surcharged with the great forces of the public welfare burst over his head,"<sup>1</sup> there is no presumption of legality from delay.<sup>2</sup>

There seems, therefore, slight reason to doubt that the importers are in season to be heard carefully by the court in the consideration of this question.<sup>3</sup> It is a question which, as we have said, merits and will receive an attention commensurate to its far-reaching consequences. If the line is not drawn at this point, it is difficult to say where it can logically be drawn. Vast interests of all kinds are involved in limitations of taxation; for, as was grimly said by the leading American jurist,<sup>4</sup> "The power to tax involves the power to *destroy*."

*Charles F. Chamberlayne.*

BOSTON, Jan. 23, 1892.

---

<sup>1</sup> Hon. W. M. Evarts, *Defence of President Johnson*, 2 *Impeach.*, p. 269.

<sup>2</sup> *Gross v. Rice*, 71 Me. 241.

<sup>3</sup> *Cooley*, *Taxation*, 46, 55, 104; *Marbury & Madison*, 1 Cranch, 177; *Sedgwick*, *Stat Law*, 414; *Hurtado v. California*, 110 U. S. 516, 536.

<sup>4</sup> Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. 341.

# HARVARD LAW REVIEW.

---

Published monthly, during the Academic Year, by Harvard Law Students.

---

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

---

## *Editorial Board.*

OLIVER PRESCOTT, JR., . . . . .	<i>Editor-in-Chief.</i>
PHILIP S. ABBOT, <i>Treasurer,</i>	RICHMOND O. AULICK,
ALBERT S. BARD,	ALBERT E. HADLOCK,
NORMAN HAPGOOD,	HENRY HUDSON,
CARLETON HUNNEMAN,	J. WRIGHT HUNT,
FREDERICK B. JACOBS,	M. DAY KIMBALL,
JAMES G. KING,	JAMES M. NEWELL,
PHILIP WARDNER,	CHARLES WARREN,
GEORGE E. WRIGHT.	

---

**HARVARD LAW SCHOOL — NEW CASE BOOKS.** — It will interest the members of this and other law schools to know that a volume of "Cases on Evidence" will be published by Professor Thayer next summer. The need of such a volume has long been felt by the members of this school, and its publication will be greatly appreciated, not only by future second-year classes, but by those who have already taken the course on evidence, and who desire to preserve the leading cases in a convenient form.

It also gives the REVIEW much pleasure to note the appearance of the sixth and last volume of Professor Gray's "Cases on Property," thus completing a series which, in its comprehensiveness, judicious arrangement and selection, and general adequacy for the purposes of instruction under the case system, is susceptible of little improvement. The members of this school have indeed cause for gratitude to Professor Gray, who, at the expense of an untold amount of labor, thought, and time, has so materially lightened the work and the difficulties of those who have had the privilege of studying under his guidance.

**BOSTON UNIVERSITY LAW SCHOOL — CASE SYSTEM ADOPTED** — Our readers will be interested to know that the faculty of the Boston University Law School is about to introduce into the school the system of study known as the case system. The first topic to be treated in this way will be Bills and Notes, and gradually the new method will be extended to other subjects. The plan of work will be as follows: The class will be divided into two divisions, each of which is to contain three sections. A member of each section will act as leader to superintend the work of his companions. Each section will be given a different subject as far as possible, in order to avoid an over-demand for the books. Once a week each section will meet to discuss the cases read. The leader will preside and conduct the discussion. The professors from time to time are to call the whole class together for recitation on the cases. In this way the students are afforded even better opportunities for discussion than are attainable when the whole

class meets, and the work by sections will decrease the difficulty of getting the books of reference. It is to be hoped the Boston University will meet with all success in its new method.

MISCONDUCT OF A JUDGE—ITS INFLUENCE ON THE JURY.—The untamed State of Washington furnishes a rather amusing application of the constitutional provision prohibiting a judge from commenting on matters of fact to the jury. His honor passed his time in perusing a newspaper during the testimony of the defendant, and while the defendant's attorney was endeavoring to impeach the testimony of a witness for the prosecution the court exchanged smiles, pleasant observations, and candy with the said witness. This, the upper court not unreasonably holds, comes too near, especially in a capital case, to an intimation that the defendant's view of the matter was of small import, and the court ventures to hope that such an occasion for reversal will not very often arise.

PRIVILEGE OF WITNESSES IN FEDERAL COURTS.—In the April number of the REVIEW, Mr. Louis M. Greeley discussed the case of *Counselman v. Hitchcock*, which arose through the refusal of a witness, summoned in an investigation under the interstate commerce law, to answer certain questions, on the ground that he would criminate himself by so doing. The District and Circuit Courts for Northern Illinois ruled that the witness must answer, inasmuch as by Section 860 of the Revised Statutes the evidence could not be used against him in any criminal proceeding, and therefore his constitutional rights were not invaded. The question never having arisen in the Supreme Court, Mr. Greeley discusses it on principle. He says in substance that the fifth Amendment guarantees the privilege of a witness against compulsory, self-accusatory evidence; that this privilege may be abrogated by statute if the statute affords the witness complete amnesty as to the crime concerning which he was compelled to testify; but that Section 860 of the Revised Statutes does not do this, inasmuch as it does not prevent sources of evidence disclosed by his evidence from being used against him; the obvious conclusion being that under the present state of the law a witness may refuse to testify if his answer will tend to criminate himself.

It is interesting to note that the case has just been decided on appeal by the Supreme Court of the United States substantially in accordance with the principles above stated. The decisions of the District and Circuit Courts are reversed. The court says: "It is a reasonable construction, we think, of the constitutional provision [that "no person . . . shall be compelled in any criminal case to be a witness against himself"] that the witness is protected 'from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him.'<sup>1</sup> It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. . . . In view of the constitu-

<sup>1</sup> *Emery's Case*, 107 Mass. 172, 182.



tional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates."

In the course of the opinion the court considers the provisions of the Massachusetts Constitution, that the witness shall not be "compelled to accuse, or furnish evidence against himself," and of the New York Constitution, which is in the same language as that of the Fifth Amendment. The conclusion is reached that inasmuch as the general purpose of these constitutional provisions is to prohibit compulsory self-accusatory evidence, "the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have, as far as possible, the same interpretation," and that "there is really, in spirit and principle, no distinction arising out of such difference of language."

**TROVER FOR CONVERSION BEFORE PLAINTIFF'S TITLE HAS ACCRUED.**—The case of *Bristol and West of England Bank v. Midland Railway Co.* [1891], 2 Q. B. 253, offers food for reflection. The proposition which it would seem that the Court of Appeal intended to lay down, is that an action of trover or detinue will lie against a bailee for non-delivery of goods, even though they have been wrongfully disposed of to a third party before the plaintiff's title accrued.

Considering the case first as an action of trover, the proposition is certainly startling that A, who has got title to goods, can demand them from, and on refusal sue for conversion, B, who has never had them in his possession since the plaintiff owned them. Opposed to such a contention is Lord Blackburn's dissenting opinion in *Goodman v. Boycott*, 2 B. & S. 1, and a statement in Clerk & Lindsell on Torts, p. 183, that "there cannot be a conversion by demand and refusal, unless at the time of the demand the defendant had it in his power to return the property."

The decision might be sustained on the authority of *Franklin v. Neate*, 13 M. & W. 481 (a case of judicial legislation founded on no principle), that a purchaser from a bailor may proceed in his own name against a bailee. This seems to be the ground of Lord Coleridge's decision in the Queen's Bench, but Lord Justice Lindley prefers to rest the case on a different principle. Moreover, an examination of the case seems to indicate clearly that the conversion sued on is not the wrongful disposal of the goods while the bailor retained title, but a conversion arising from the refusal of the plaintiff's demand to produce chattels converted before he had any interest in them. Further, if the action were founded on the earlier act of conversion, the plaintiff would be liable to be met by all the defences which could be raised against his assignor,—a possibility certainly not contemplated by the court.

The ground of the decision in the Court of Appeals—and it meets with the approval of Sir F. Pollock—is the broad principle that "a man who wrongfully parts with goods is liable as if he had them still in his possession. *Qui dolo desit possidere pro possidente damnatur.*" Reducing this to its lowest terms would seem to bring it down to that shifty thing, estoppel; and what is the estoppel? The answer must be

that the plaintiff has been induced to purchase relying on the representation arising from every contract of bailment, that the bailee will be true to his promise to keep the goods in his possession. But is this satisfactory? Through how many transfers, and for what period of time, will the court apply this rule and say that the statute has not been running in favor of the defendant although it has for the benefit of his assignees? Moreover, the inquiry suggests itself, after an act of conversion, can a subsequent demand and refusal constitute a fresh conversion?

Regarding the action as one of detinue, the decision is no more satisfactory; for the action, if detinue *sur trover*, must be based on the demand and refusal, and the difficulty suggested above recurs, namely, that since the goods have been the plaintiff's the defendant has never had them. If the gist of the action is detinue *sur bailment*, then the contract from the breach of which the action arises is that made with the plaintiff's assignor, but for the assignee to maintain the action in his own name is indefensible, on principle. Besides, as was said before, it is clear that the court considered that the right which the plaintiff is seeking to enforce is not that derived from the assignment, but one which is original with himself.

### LECTURE NOTES.

[The following note was prepared by Professor Gray and read by him to the third-year class in connection with the case of *Wilkinson v. Duncan*, p. 661 of Vol. V. of the Cases on Property.]

RE MOTENESS OF SEPARABLE GIFTS.—Since *Griffith v. Pownall*, 13 Sim. 393 (1843), it has been settled that if the persons to whom a devise or legacy is made are described as a class, but the amount of the gift to each member of the class is in no way affected by the gift to any other, then the gifts are separable, and some may be valid though others are too remote. Thus a legacy of \$1,000 to each of the testator's grandchildren who reaches twenty-five is a valid gift to all the grandchildren who are alive at the testator's death, although it is not a good gift to those who are then unborn.

The case of *Wilkinson v. Duncan*, 30 Beav. 111 (1861), has generally been cited as an illustration of this principle, but without sufficient attention to its facts. In that case property was given upon trust for G for life, and on G's death to such of his children, and in such manner, as he should appoint. G appointed \$2,000 to each of his daughters on reaching twenty-four. He had four daughters, three over and one under three years of age. (See 7 Jur. N. S. 1182.) It is not distinctly said that none of the daughters were alive at the time of the creation of the power, but as no reference was made to such a fact, and as the power was created twenty-three years before its execution, it may be assumed that none of the daughters were then born. Sir John Romilly, M. R., held that the gifts to those daughters who were over three years old at their father's death were not too remote.

Let us consider the case first as if it were a direct gift; that is, suppose the testator had given \$2,000 to each one of G's daughters who should reach twenty-four, and as the gifts to the daughters are independent, let us consider separately the gift to a particular daughter, whom we will call X. In order that X shall take, what must happen? X must be born and she must reach twenty-four years of age. It is not certain that she will be born until just before the death of her

parent, and should that be the case the time for her gift may not fall within the required limits; the gift is therefore too remote. If X is alive at the time of the testator's death, then the only thing to happen is her reaching twenty-four, and as that must happen, if at all, in her lifetime, and she is alive at the testator's death, the gift to her cannot be too remote.

Let us now look at the case as it really arose, a gift under an exclusive power to G to appoint among his children, and an appointment by his will of independent sums to those of his daughters who should reach twenty-four, the daughters being some more and some less than three years at the time of his death. Of course the daughters under three could not take; could those more than three years old take? As the gifts are separable, the fact that there were or might be other daughters who could not take would not invalidate the gifts to those who were over three years of age. But were those gifts in themselves good?

If, to use the common phrase, the words of the appointment are read into the instrument creating the power, then we shall have the case we have just been considering, and the legacy to the daughters would be bad, except to those living when the power was created.

This phrase, however, is not in all respects correct. The word "daughters" should have given to it the meaning which the donee gave to it; that is, of certain individual girls, having in fact certain names and certain ages, *e.g.* A who is six years old, B who is five years old, C who is four years old, D who is two years old. But it must be observed that the being of these ages is not a condition which the donee has attached to the appointments. As the intention of the donee was to appoint to particular persons, those persons' names may be read into the creating instrument, but the qualities of those persons cannot be read into the creating instrument as conditions for the gift, unless the donee has made them so. Therefore if we call an appointee unborn at the time of the creation of the power X, it was not then certain that the gift to X, in the case we are considering, might not take effect beyond the required limits.

If the appointment had been to such of the donee's daughters as should be three years old at his death, upon their reaching twenty-four, the gift would have been good, because at the creation of the power no legatee answering the required description could possibly take at too remote a time.

*Wilkinson v. Duncan* therefore would seem to be wrong, and also, *a fortiori*, *Von Brockdorff v. Malcolm*, 30 Ch. D. 172, which professes to rest upon it; and the attempt in the *Addendum*, Gray, Perp., p. xxxiii, to support the latter case fails.

---

## RECENT CASES.

---

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMIRALTY — STATUTORY LIABILITY OF OWNER. — A steam-propeller was wrecked and abandoned to the underwriters as a total loss. It was subsequently taken in tow by a wrecking-master, but sank within twenty-four hours, and one

of the crew was drowned. *Held*, that the underwriter is liable. The propeller was still a "vessel" and he an "owner" within the meaning of the statute limiting the liability of the owner. And the restriction of the statute limiting the liability to vessels not "used in rivers or inland navigation" does not apply to a vessel used on the Great Lakes. *Craig v. Continental Ins. Co.*, 12 Sup. Ct. Rep. 97.

AGENCY — FELLOW-SERVANT — COMMON EMPLOYMENT. — The captain and each of the crew of a vessel are fellow-servants engaged in a common employment, so that the owner of a vessel is not responsible for an accident caused to the one through the negligence of the other. *Hedley v. Steamship Co.*, 40 W. R. 113 (Ct. of Ap.).

BILLS AND NOTES — ACCEPTANCE BY TELEGRAM. — The plaintiff telegraphed to the defendant, asking him if he would accept a check drawn on him. The defendant answered in the affirmative. *Held*, this is an acceptance in writing within a Missouri statute providing that no acceptance shall be good unless in writing. *Garretson v. North Atchison Bank*, 47 Fed. Rep. 867.

BILLS AND NOTES — PAYMENT OF FORGED BILL — DRAWEE INJURED BY NEGLIGENCE OF DRAWER. — A bank paid a forged check. The depositor was so negligent in informing the bank of the forgery that, in the ordinary case, he would be chargeable with the amount. *Held*, the bank, in order to take advantage of this negligence, must show that it has been injured by it. *Janin v. London & S. F. Bank*, 27 Pac. Rep. 1100 (Cal.).

CARRIERS — LIABILITY IN TORT FOR EJECTION — SUNDAY LAW. — Where plaintiff, having bought a ticket, is wrongfully put off defendant's train, he can recover, although his contract for transportation was void under the Sunday statute. His action sounds in tort for "the violation of a personal right secured by the law," "in a certain sense independent" of the contract, although originating from it. *Chicago, St. L., & P. R.R. Co. v. Graham*, 29 N. E. Rep. 170 (Ind.).

CONFLICT OF LAWS — BILLS OF EXCHANGE — PAROL ACCEPTANCE. — An agreement made in Missouri by a resident of Illinois to accept and pay drafts at his place of business in Illinois is governed by the law of the latter State, to the exclusion of the Missouri statutes. And in Illinois such a parol promise is binding on the acceptor. *Hall v. Cordell*, 12 Sup. Ct. Rep. 154.

CONFLICT OF LAWS — INTEREST ON BOND AFTER MATURITY. — Bonds of a South Carolina railroad company, made payable in pounds sterling, and both principal and interest to be paid at a designated banking-house in London, are sued on. It appears that the holder has for several years after maturity accepted interest at the English rate. The question is whether interest after maturity is to be paid at the rate paid in England or in South Carolina. *Held*, that the English rate is to be paid. The form of the bond raises such a presumption, which is made conclusive by the receipt of that rate for several years. *Coghlan v. So. Car. R. Co.*, 12 Sup. Ct. Rep. 150.

CONSTITUTIONAL LAW — EMINENT DOMAIN — GRADE CROSSINGS. — Where a railroad corporation, formed under the general railroad law, locates its route so that its line crosses the route of another railroad, the law gives it the right to decide for itself whether it will cross such other road at grade or otherwise. The only limitation upon this right is that it shall not unduly impair either the safety or the reasonably fair enjoyment of the road whose route is crossed. *Jersey City N. & W. Ry. Co. v. Central R.R. Co.*, 22 Atl. Rep. 728 (N. J.).

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — STATE TAXES. — A Maine statute requires every railroad corporation in the State to pay "an annual excise tax for the privilege of exercising its franchises," the amount of the tax to be determined according to a sliding scale proportioned to the average gross earnings per mile within the State for the year preceding the levy of the tax. *Held*, that the method of determining the amount of the tax is merely a way of ascertaining the value of the privilege, and does not render the tax a tax upon the receipts themselves, and hence, in its application to railroads which enter the State from another State or Canada, the act does not operate as a regulation of interstate or foreign commerce — Bradley, Harlan, Lamar, and Brown, JJ., dissenting. *State of Maine v. Grand Trunk Ry. Co.*, 12 Sup. Ct. Rep. 121. Diss. Opinion, 12 Sup. Ct. Rep. 163.

**CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS.** — There is no federal question involved in a decision of a State court upholding a statute which, by changing the terms of a contract between a city and a water-works company, impaired the obligation thereof, within the prohibition of the federal Constitution, when it appears that the contract claimed to have been impaired was *ultra vires* and void, and had been so declared by the State court. *City of New Orleans v. New Orleans Water-works Co.*, 12 Sup. Ct. Rep. 142.

**CONSTITUTIONAL LAW — TAKING PROPERTY FOR PUBLIC PURPOSE.** — A statute which provides that land may be flowed for the purpose of fish culture is constitutional, as the taking of private property is for a public purpose. And a pond maintained for the culture of useful fish, though maintained only for the profit and benefit of the owner, is within the purposes of the act. *Turner v. Nye*, 28 N. E. Rep. 1048 (Mass.).

**CONSTITUTIONAL LAW — WEAVERS' FINES ACT UNCONSTITUTIONAL.** — The Weavers' Fines Act, passed by the Massachusetts Legislature of 1891, declaring that "No employer shall impose a fine upon, or withhold the wages, or any part of the wages, of an employe engaged at weaving, for imperfections that may arise during the process of weaving," is unconstitutional, as interfering with the inalienable right of "acquiring, possessing, and protecting property" guaranteed by the State Constitution, by restricting the necessarily incidental right to make reasonable contracts, and as impairing the obligation of contracts within the meaning of the federal Constitution. Holmes, J., dissents. *Com. v. Perry*, 28 N. E. Rep. 1126 (Mass.). See note on this case, 5 Harvard Law Review, 287.

**CONTRACT — INSURANCE — CANCELLATION — WHEN TAKING EFFECT.** — By a New York statute it is obligatory upon fire insurance companies to cancel any policy issued by them at the request of the insured. Plaintiff, who held a policy from defendant, wishing to cancel it, mailed the policy, together with a letter expressing his purpose, to defendant's agent. After the time of mailing, but before the time of receipt by the agent, plaintiff's house was burned. *Held*, in a suit upon the policy, that he could recover; the notice of termination of the policy took effect when received, not when mailed. *Crown Point Iron Co. v. Etta Ins. Co.*, 28 N. E. Rep. 653 (N. Y. Ct. of App.).

The court distinguish these facts from the well-known case of the acceptance of an offer to contract (*Vassar v. Camp*, 11 N. Y. 441), by saying that there was here no element of contract. But *quare* whether this explanation explains.

**CONTRACTS — MUTUAL CONSENT — OFFER OF REWARD.** — A person who has captured a thief for whose apprehension a reward has been offered is entitled to the reward, although he made the capture in ignorance of the offer. *Williams v. Carwardine*, 4 B. & Ad. 621, followed. *Everman v. Hyman*, 28 N. E. Rep. 1022 (Ind.).

**CONTRACTS — DELAY FROM STRIKE — REASONABLE TIME.** — The obligation of a consignee of a cargo, under a bill of lading, which contains no specified limit of time for unloading, is to unload within a reasonable time after the arrival of the ship at the port of discharge, and the reasonableness of the time is to be measured by the circumstances existing at the time of the unloading. *Held*, accordingly, that a consignee of cargo under a bill of lading, who, through no act or default of his own, but owing entirely to a strike of laborers at the port of discharge, did not unload for nearly one month after the ship's arrival, was not liable to the ship-owner for damages for detention of the ship. *Hick v. Rodocanachi*, 40 W. R. 161 (Ct. of Appeal).

By terms of a charter-party in which the port of discharge was specified, the cargo was "to be discharged with all despatch as customary." *Held*, that the effect of the charter-party was to render the charterers liable for delay occasioned by a strike of laborers at the port of discharge during the unloading of the cargo. *Castlegate Co. v. Dempsey* (1892), 1 Q. B. 54.

**CRIMINAL LAW — ALIBI — REASONABLE DOUBT.** — Under the defence of an *alibi* it is sufficient if there is enough evidence to produce a reasonable doubt as to the presence of the prisoner at the killing. *Adams v. State*, 10 So. Rep. 106 (Fla.).

A stricter rule is required in some jurisdictions, viz., that the prisoner must establish his *alibi*, if not beyond a reasonable doubt, at least by a preponderance of evidence, to entitle it to any weight. *State v. Beasley*, 50 N. W. Rep. 570 (Ia.).

**CRIMINAL LAW — FALSE PRETENCES — CONTRIBUTORY GUILT.** — One who obtains money by false pretences is liable to punishment, though the person from whom it was obtained parted with it in furtherance of an illegal purpose to obtain by fraud valuable land from the United States. *Cummins v. People*, 27 Pac. Rep. 887 (Col.).

This decision is directly contrary to that of the leading case of *McCord v. People*, 46 N. Y. 470. The New York rule is followed in Wisconsin. *State v. Crowley*, 41 Wisc. 271. On the other side, and in accord with the Colorado case, are the leading cases of *Com. v. Morrill*, 8 Cush. 571, and *Com. v. Henry*, 22 Pa. St. 253.

**EQUITY — INJUNCTION — RESTRAINING ACTION AT LAW.** — A agreed to build a piece of road for \$29,000, with the right to retain possession thereof and run it for his own benefit until that sum was paid. After completing the road and before receiving full payment, he was forcibly dispossessed by the officers of the railroad company, and brought an action of forcible entry and detainer in the District Court. Pending this action he entered into a written stipulation with the company that the sum due under the contract was \$25,000. Judgment was rendered in his favor. Seven months later the company's successor tendered A \$25,000, with interest to date, which A refused. This bill is to enjoin A from taking possession under his judgment. *Held*, that the agreement was a settlement of the amount due A, and on payment into court the complainant was entitled to the injunction prayed. Lamar, J., dissenting. *St. Louis, I. M., & S. Ry. Co. v. Johnson*, 12 Sup. Ct. Rep. 124.

**EQUITY — SETTING ASIDE CONVEYANCE — INSANITY — MARRIAGE.** — Defendant, by fraud and undue influence, obtained from plaintiff, an insane person, conveyances and transfers of all his property; and the next day she persuaded plaintiff to go through the form of marriage with her. *Held*, that a bill would lie by plaintiff, through his guardian, to avoid such conveyances and transfers, although proceedings which had been instituted to annul the marriage had not yet been decided in plaintiff's favor, and although she was, therefore, still his wife. *Lombard v. Morse*, 29 N. E. Rep. 205 (Mass.).

**ESTOPPEL — HOLDING OUT — LIABILITY — TORT.** — A traction engine, to which the name and address of the owner were affixed, was let on hire by the owner for three months. Owing to the negligence of the hirer while driving it along the highway, the plaintiff, who was in a carriage, was injured. *Held*, that the owner was not liable. Lord Esher, commenting on *Stables v. Eley*: "If that case decides that a person who sends out a carriage with his name upon it holds himself out as being responsible to any one injured by it through the negligence of the driver, I think it was wrongly decided. The highest that that case can be put on as an authority is that the name being affixed to the carriage is *prima facie* evidence of the liability of the person whose name is so affixed as owner; but that *prima facie* liability may be rebutted by evidence." *Smith v. Bailey*, 40 W. R. 28 (Ct. of App., Eng.).

**EVIDENCE — DAMAGES — COLLATERAL MATTER.** — In proceedings by a city to condemn a water-right which is not being utilized, evidence of the amount recently paid by the city for a similar neighboring water-right is incompetent. *In re Thompson*, 28 N. E. Rep. 388 (N. Y.).

Authority is very evenly divided upon this question. In Massachusetts, New Hampshire, Illinois, Iowa, and Wisconsin such evidence is admitted; Pennsylvania, New York, Georgia, and California agree with the principal case.

**INFANCY — RIGHT OF NEXT FRIEND TO COMPROMISE.** — An action of tort was brought by plaintiff's father as next friend. At the trial defendant offered to show, in bar of the action, an executed accord and satisfaction between himself and the father. *Held*, that evidence upon this point was rightly excluded. Such a settlement, made for less than the full amount of the infant's demand, is beyond the power of the next friend, and will not bind the infant unless it is confirmed by the court, or unless, with the approval of the infant's counsel, final judgment is entered in accordance with it. — *Tripp v. Gifford*, 29 N. E. Rep. 208 (Mass.).

**INSURANCE — QUASI-CONTRACT.** — A married woman, having insured her life in the defendant company by a policy made payable to her children, died childless. *Held*, that the defendant was not liable for anything to any one at law;

possibly in equity the administrator of the insured might recover the amount of premiums paid. *McEhwee v. New York Co.*, 47 Fed. Rep. 795.

There would seem to be a good quasi-contract here upon which the defendant might be charged in equity for the full amount of the policy, on the same principle which permits a recovery upon a lost or destroyed bill or bond.

**QUASI-CONTRACTS — RIGHT OF SON AGAINST A PARENT'S EXECUTOR FOR SUPPORT OF THE DECEASED.** — Where a son presented a claim against his mother's executor for board, attendance, support, etc., furnished by the son to the mother during the latter's lifetime: *held*, that such services, on account of the relationship, are presumed to have been furnished gratuitously, and that such presumption can only be rebutted by clear proof of an agreement between the parties for compensation. *Wilkes v. Cornelius*, 27 Pac. Rep. 135 (Ore.).

The court do not seem to have had in mind the leading New Hampshire case of *Servus v. True*, 53 N. H. 627, which holds what is conceived to be the true rule, that, if the claimant in such cases performed the services with the expectation of being remunerated, he is entitled to recover. In this view, it is immaterial whether or not there was an express agreement between the parties.

**PROPERTY — RIPARIAN RIGHTS — MILL-SITE.** — The owner of a mill-site at which a mill was formerly operated, but which had not been in use within six years of the time of bringing the action, cannot recover for the injury to the mill-site or water-power caused by the defendant's diversion of the waters of the stream, although entitled to nominal damage for the diversion itself. *Clark v. Pennsylvania R.R. Co.*, 22 Atl. Rep. 989 (Pa.).

**PROPERTY — SEPARATE ESTATE FOR UNMARRIED WOMAN.** — A use for the sole and separate benefit of a woman who, at the time of its creation, was neither married nor in immediate contemplation of marriage, is void; and a separate estate effectually created at the time of a woman's first marriage will not revive for her protection under a second marriage. *In re Quinn's Estate*, 22 Atl. Rep. 965 (Pa.).

The case is of especial interest as tracing the development of the doctrine and contrasting the law in Pennsylvania, as here declared, with that held in England.

**REAL PROPERTY — COVENANTS RUNNING WITH THE LAND.** — Where A conveyed a way over her premises to a railroad company, in consideration of one dollar and the company's covenants to build a railroad, run daily trains, and erect a depot, and A subsequently assigned to B, and the company later abandoned the roadbed: *held*, that the covenants did not directly benefit the land and did not run. *Lyford v. North Pac. R. Co.*, 27 Pac. Rep. 103 (Cal.).

**REAL PROPERTY — EASEMENTS — ALTERATION OF THE EASEMENT.** — Where defendant is the owner of an easement to run water in an open ditch over the plaintiff's land, and undertakes to lay pipes in the ditch of no greater carrying capacity than the ditch, even though the change would be less burdensome to the plaintiff and more convenient to defendant, nevertheless the alteration would tend to substitute a new and different easement and will be enjoined. *Allen et al. v. San José Land & Water Co. et al.*, 27 Pac. Rep. 215 (Cal.).

**REAL PROPERTY — EASEMENTS — RIGHT OF REVERSIONER TO SUE.** — Defendant company built an elevated railroad through the street upon which plaintiff's land abutted, but did not condemn the easement of light, air, and access appurtenant to that land. Plaintiff subsequently let the land for a term of years. Later, while thus out of possession, plaintiff brings action for disturbance of his easement. *Held*, that he could recover, because of the diminution of the rental value of the land. *Seemle*, that the lessee would have no action. A different case, however, would be presented if the lease had been made before the construction of the railroad. *Kernochan et al. v. N. Y. El. R.R. Co.*, 29 N. E. Rep. 65 (N. Y.).

**REAL PROPERTY — EQUITY OF CONTRACT RUNNING WITH THE LAND.** — Defendant contracted for the purchase of a lot in a fashionable quarter of Brooklyn, directly behind plaintiff's premises, and announced his intention to build on it a seven-story flat. Plaintiff bought off defendant's contract, paying \$6,000 more than the market value of the lot in consideration of defendant's agreement to erect no such building anywhere in plaintiff's neighborhood. Defendant forthwith bought the lot opposite, began to build a flat on it, conveyed it to his wife, who had notice of the contract, and went on with the building as her agent. *Held*, that a bill by plaintiff would lie against defendant and his wife, to enjoin

the completion of the building. Plaintiff's equity attached from the moment of the purchase, to any land in the neighborhood bought by defendant, and ran with the land when that passed into the hands of a subsequent purchaser with notice. — *Lewis v. Gollner et al.*, 29 N. E. Rep. 81 (N. Y.).

**REAL PROPERTY — EXECUTORY DEVISE.** — The testator by his will devised real estate to his son for life, and after his death to all the children of his son, whether then or thereafter to be born, who should attain twenty-one. He declared that his son should not have any power to sell or dispose of his life estate, and in case his said son should attempt to sell or dispose of the same, or become bankrupt, or the estate should be taken in execution by any process of law for benefit of any creditor, then he declared that the devise to his son should immediately become void, as if such son were then actually dead, and that the estate so devised to him should thenceforth vest in the persons who under the devises before mentioned would be next entitled. The son's interest was taken on execution, and consequently became void. *Held*, that in order to carry out testator's intention, the gift over must be construed, not as a contingent remainder, but as an executory devise, so as to enable all the son's children in existence at the date of the order, or born, or to be born thereafter, to share in the property on their attaining twenty-one. *Blackman v. Fysh*, 39 W. R. 520 (Eng.).

Devise, subject to a life estate, to the use of such child or children of the said E. D. "as either before or after the death of the said E. D." should attain the age of twenty-one. *Held*, an executory devise (following *Lechmere v. Lloyd*, 18 Ch. D. 524). *Dean v. Dean*, 39 W. R. 568 (Eng.).

**TORT — SEDUCTION — LOSS OF SERVICE.** — The Statute of Limitations begins to run against an action for damages by a parent for the seduction of a child from the moment of seduction, and not from the time of loss of services. *Dunlap v. Linton*, 22 Atl. Rep. 819 (Pa.).

**TORTS — TROVER — PLEDGE — PROPERTY IN THE GOODS.** — Goods were shipped under a bill of lading which provided that they, the goods, were to be delivered to the order of the consignor or his assignees. The invoices were sent to the consignee and a bill of exchange for the price drawn by the consignor on the consignee, which, together with the bill of lading endorsed in blank, was sold and delivered by the consignor to his bankers, with a hypothecation note authorizing the bankers to retain the bill of lading and sell the goods if the consignee either declined to accept the bill of exchange, or failed to pay it at maturity.

The goods, on the arrival of the ship, were deposited by the ship-owner with the defendants, a railway company, to be delivered up on order of the ship-owners. The consignee of the goods, who had accepted the bill of exchange and paid the freight, induced the defendants wrongfully to hand over the goods to him without his producing either the bill of lading or any delivery order from the ship-owners. At a subsequent date, when the bill of exchange was about to become payable, the consignee requested the plaintiffs, who were his bankers, to pay it and debit his account therewith. The plaintiffs accordingly paid the bill of exchange and received it and the bill of lading from the consignor's bankers, and also obtained a delivery order from the ship-owner; but when they presented these to the defendant company, it was discovered that the latter had already given up the goods to the consignee.

In an action for damages for the non-delivery of the goods by the defendant to the plaintiffs: *Held*, that the plaintiffs were pledgees at law of the goods, and as such could maintain an action of trover or detinue against the defendant company for non-delivery of the goods; and the fact of the wrongful delivery of the goods having occurred before the accrual of the plaintiff's title afforded no ground of defence to the action. *Bristol Bank v. Midland R.R. Co.*, 40 W. R. 148 (Ct. of App. Eng.). See note, p. 347.

**WILLS — TESTAMENTARY COVENANTS — VALIDITY.** — A voluntary covenant in writing that the covenantor's executors shall, after her death, pay to the covenantee a certain sum is not contrary to the policy of the laws of Massachusetts. The reasons do not apply which underlie the statute requiring three witnesses to a will. *Krell et al. v. Codman*, 28 N. E. Rep. 578 (Mass.).



## REVIEWS.

**SELECTIONS ON CONTRACTS.** By William A. Keener, Professor of Law and Dean of the Faculty of Law in Columbia College. Two vols., pp. 1222. Baker, Voorhis, & Co., New York. Price, \$12.

This book is intended primarily for the use of first-year students in the Columbia Law School. It consists of a collection of well-known English and American cases, taken from Finch's "Cases on Contracts," with very liberal slices from Mr. Leake's treatise on Contracts sandwiched in between. The editor thus brings together in one book the text of a standard treatise and the cases on which the text is founded. This plan is adopted in aid of the method of instruction now used at Columbia. Whether this method will enable the student to acquire an equal knowledge of the law with the expenditure of a smaller amount of time and energy, or will prevent him from acquiring the independent habit of thought and firm grasp of principles which comes from grappling single-handed with the difficulties which beset the beginner in the study of cases, can be learned only from experience. In the opinion of those who have been trained under the case system pure and simple, one of its chief merits is that it gives the student a power to extract with confidence the *ratio decidendi* of any case, and to compare it intelligently with other cases on the same subject; to ascertain for himself the principles on which it was decided, and see the considerations which influenced the court in reaching its decision. Whether the Columbia method is so well adapted to this end as is the Harvard method remains to be seen. It may well be that a difference in the existing circumstances of the two schools may render a slightly different system desirable. It is not, however, our purpose to discuss the Columbia method, except in so far as it is involved in the plan of this book.

The reprint in this form of a leading text-book would seem to be no great gain to the educational literature of the law. The exigencies of the Columbia method may, however, require it. One obvious disadvantage of the plan is that it requires the books to be of an inconvenient size. In appearance and make-up it is inferior to Professor Keener's collection of cases on Quasi-contracts.

The selections are not confined to the essential elements of the simple contract merely, but cover nearly the whole field dealt with by the ordinary text-books.

**THE AMERICAN DIGEST:** Annual, 1891: Also the Complete Digest for 1891. Prepared and edited by the editorial staff of the National Reporter System. St. Paul, Minn.: West Publishing Company, 1891. Pages 5103.

The digest is modelled on the same plan as that adopted last year. It is somewhat larger, covering the twelve months from September 1, 1890, to August 31, 1891. In form it presents no new features. The completeness of this Digest is its greatest merit, and its success during the past year proves the wisdom of consolidating and bringing all the cases into one volume.

**LAWYERS' REPORTS, ANNOTATED.** Book XII. Robert Desty, editor. The Lawyers' Coöperative Publishing Company, Rochester, N. Y., 1891. Pages 911.

This volume contains a selection of recent cases of general importance decided in the various state and territorial courts. The book is something upon the plan of a collection of leading cases. Notes of various lengths are appended to the cases, containing brief statements of existing law upon the topics touched upon by the decisions. An index of subjects treated by the notes and cases is appended. It is not entirely clear just for what use the book is intended; it certainly cannot take the place of the regular reports. It is of interest, however, as showing some new points of law recently decided.

**GENERAL DIGEST OF THE DECISIONS OF THE PRINCIPAL COURTS IN THE UNITED STATES, ENGLAND, AND CANADA.** Published by the Lawyers' Coöperative Publishing Company, Rochester, N. Y., 1891. Pages 2231.

The sixth volume in this series of annual digests covers the year ending in September, 1891. It contains 18,000 cases digested in 36,000 paragraphs. Each paragraph is intended to contain a distinct point of law, and needless repetition has been avoided by combining cases involving identical points into the same paragraphs. Citations are given from many unofficial reports, as well as from the official reports. All the regular English reports and the decisions of the Supreme Court of Canada are digested. A most important requisite of a good digest is proper and complete classification, and logical and orderly arrangement of heads and sub-heads. The publishers claim to have paid particular attention to these matters. Such a work is an excellent antidote to protect one from the depressing effect of eighteen thousand reported cases in the year just past.

## LEADING ARTICLES IN EXCHANGES.

### **The Green Bag.** Vol. IV.

No. 1. Caleb Cushing (with portrait); Legal Emergencies; Supreme Court of Georgia; Ancient Jewish Law.

### **Washington Law Reporter.** Vol. XX.

No. 1. Damages for Refusal to Cash Check.

No. 3. Law Reform; A Sur-Rejoinder.

### **New Jersey Law Journal.** Vol. XV.

No. 1. Children playing on Railroad Turn-table.

### **Irish Law Times.** Vol. XXV.

No. 1299. Collusive Compromises.

No. 1300. Defamation in Course of Judicial Proceedings.

No. 1301. "Effects" and "Other Effects" in Wills.

No. 1302. } Interest on Tradesmen's Effects.

No. 1303 }

### **The Law Journal.** London Vol. XXVI. and Vol. XXVII.

No. 1354. A Desk and its Contents.

No. 1357. Law of Inebriety.

### **Albany Law Journal.** Vol. XLV.

No. 1. Pardon before "Conviction."

No. 2. Maybrick Case.

### **Central Law Journal.** Vol. XXXIV.

No. 1. Sufficiency of the Memorandum under the Statute of Frauds.

No. 2. Partnership Liability of Stockholders.

No. 4. Guardian and Ward.

# HARVARD LAW REVIEW.

---

VOL. V.

MARCH 15, 1892.

No. 8.

---

## THE JURY AND ITS DEVELOPMENT.

---

### III.

THERE was certainly one sort of trial in which witnesses were publicly examined before the jurors at an early period; and this may well have been a provocation to the same thing in the regular jury trial. I mean the case of challenges to the jurors. The "triors," generally two of the unchallenged jurors, might question the challenged men on oath, and might be sworn and charged to say whether these were telling the truth. We see this in the hard-fought case of *Wike v. Gernon*, reported as of 1371-1375.<sup>1</sup> There had been a struggle over empanelling the jurors, involving questions about taking an unequal number from two counties, and about challenges to jurors as being in the service of a party, and as having given their verdict beforehand<sup>2</sup> by telling their opinion, and as otherwise bad. The reporter adds, "And yet the persons who were challenged were sworn to give evi-

---

<sup>1</sup> Lib. Ass. 301, 12; s. c. ib. 304, 5; 315, 1; 315, 5; Y. B. 48 Edw. III. 30, 17. An assise of novel disseisin. The parties were at issue as to whose son the defendant was, Alice G.'s or Alice W.'s; and there was a great debate over the question of what jury should try the question, a jury from Essex, where the defendant said he was born, or from Lincoln, where the land was. It was finally determined to take it from both counties. The jury were out three days before agreeing, and when they came to give their verdict all went for nothing by the plaintiff's becoming nonsuit. In 1382 Belknap, C. J., who had been of counsel with the plaintiffs here, asserted emphatically this power of becoming nonsuit a *chesc. temps avant plein verdict dit*. Bellewe, 251, 2.

<sup>2</sup> *Adevant main!* and so often. Had the statute of 1362 (36 Edw. III. c. 15), requiring the pleading to be in English, hurt, just a little, the purity of the reporter's French?

dence to the jurors [*i.e.*, those jurors who were trying the challenges]; and so it may be where the challenge sounds not in their reproach or dishonor. But where the challenge was for taking money of the party, it was determined by the triors, without having evidence, by their oath." In 1401 (Y. B. 3 H. IV. 4, 18), a juror was challenged as not having enough freehold, and at the request of the triors he was sworn to tell the value of his freehold, and he said five shillings; "and then the triors were charged on the question whether he told the truth, and they said that he was sufficient." While this sort of thing was going on it seems probable that a similar examination of witnesses may have been allowed, sometimes, at the trial of the case.

We have already noticed in the case of 1353 (*ante*, p. 318) that a witness was sworn to inform the jury of accusation. The same thing is seen again in 1406,<sup>1</sup> where, in conspiracy, against the bailiff of Savoy and an accusing jury, the former sets up that he was instructed by the Marshal's Court to attend the jurors and tell them what he knew, and was compelled to swear and inform them. Such a proceeding as this, however, might well be allowed, in an *ex parte* inquisition, by special order of a court, without its being recognized as the right of a party in a civil suit. But in 1433 (Y. B. 11 H. VI. 41, 36), we find something more distinct and instructive, something which indicates that it was by this time a well-known thing to testify publicly to the jury, and which shows, also, the grave perils that attended this act, and helps us to understand the slow development of the practice and the slight indications of it that we find thus far. A writ of maintenance was brought in the King's Bench against one B, charging that in an assise of rent between the plaintiff and C the defendant had "maintained" C. B answered that long before C had anything in the said rent he himself owned it, and he had granted it to C. When the said assise was brought against C the latter came to B, the present defendant, and asked him to come to the assises with him and bring his evidences relating to the rent; and accordingly B came with these and delivered to C certain ancient evidences to plead in bar against the plaintiff in discharge of his warranty of the rent; this was all the maintenance. In discussing whether this really constituted maintenance, and if so whether it was justifiable, it was insisted that the defendant should

---

<sup>1</sup> Y. B. 9 H. IV. 9, 24; s. c. 8 ib. 6, 9.

not have come voluntarily, but only by way of voucher to warranty. There was some difference of opinion among the judges, and the case was adjourned without a decision.<sup>1</sup> But the judges said certain interesting things. Hals, J., said, "In a tort of maintenance it is a good plea to say that he who is charged came and prayed us, since we were an old man of the region and had knowledge of the title of the land of which he was impleaded, that we would be with him to inform the jury about the title; and so we did, &c. So here it is good. Cheyne [C.J.] It will be adjudged a maintenance in your cases, because he has no cause or privity for maintaining the controversy more than the merest stranger in the world unless the other had cause of warranty against him. And as to what you say of its being a good plea in maintenance that he is an old man of the region, and having better knowledge of the right and title of this rent, and his coming with the defendant to declare his right in the said rent &c., I say that this is a real maintenance; for on such a ground everybody could justify a maintenance, and that would be against reason. But if he had shown a ground of the maintenance on which the law presumes him bound to be with the party, then this would not be adjudged a maintenance,—as if he were with his relation (*cosin*), or came with one because he was his servant or his tenant. He is bound to be with his servant or tenant; but it is not so in other cases."<sup>2</sup> The perils of an ordinary witness are further illustrated in a case of 1450 (Y. B. 28 H. VI. 6, 1), in which it was sought to hold certain persons sworn on an inquest, in an action for maintenance. Littleton (counsel) said, "What a man does by compulsion of law cannot be called maintenance; as where a juror passes for me and against you, &c." Fortescue. C.J., agrees to this, and adds, "If a man be at the bar and say to the court that he is for the defendant, that he knows the truth of the issue and prays that he may be examined by the court to tell the truth to the jury, and the court asks him to tell it, and at the request of the court he says what he can in the matter, it is justifiable maintenance. But if he had come to the bar out of his own head (*de son test demesne*) and spoken for one or the other, it is maintenance and he will be punished for it. And if the jurors come to a man where

<sup>1</sup> Brooke, Ab. Mayntenance, 51, says, "*et fuit in maner agree que il est bon barre.*"

<sup>2</sup> And so (1442-3) in the case of *Pomeray v. Abbot of Selby*, Y. B. 21 H. VI. 15, 30; s. c. 22 ib. 5, 7.

he lives, in the country, to have knowledge of the truth of the matter and he informs them, it is justifiable; but if he comes to the jurors or labors to inform them of the truth, it is maintenance, and he will be punished for it;" so Fortescue said, and it was admitted by the court.<sup>1</sup>

It is then abundantly plain that by this time witnesses could testify in open court to the jury. That this was by no means freely done seems also plain. Furthermore, it is pretty certain that this feature of a jury trial, in our day so conspicuous and indispensable, was then but little considered and of small importance. We see this in the valuable and very interesting book of Fortescue, "*De Laudibus Legum Angliæ*," written in Latin, not long, probably, before 1470. Fortescue had been Chief Justice of the King's Bench from 1442-1460; after being in exile with the queen and son of Henry VI., he returned to England, and was alive as late as 1476, — dying, it is said, at the age of ninety. In this book, which is written in the form of a dialogue between the Prince of Wales in exile and "a certain grave old knight, his father's Chancellor, at that time in banishment with him," the excellence of English laws is set forth, as compared with the "civil law," *i.e.*, the law of other European countries, founded on the Roman system. The first point in this comparison is the method of determining controversies of fact; more than a quarter of the book is taken up with showing how much better, in this respect, the English system is than that of the continent, where two witnesses are enough: "Slender, indeed, in resource must he be thought, and of less industry, who out of all the men he knows cannot find two so void of conscience and truth as to be willing for fear, favor or advantage to go counter to the truth in anything. . . . Who then can live secure in property or person under law like this, giving such aid to any one who would harm him." (c. 21). Under that system (c. 23), justice constantly fails from the death or failure of witnesses. In England, on the other hand (cc. 25, 26), the witnesses must be twelve; they are chosen by a public official of high

<sup>1</sup> The doctrine of maintenance seems to have scared witnesses in Chancery. It is to the period 1450-60 that a petition belongs (*Calendars of the Proceedings in Chancery*, I, p. xix.) in which a plaintiff asks the Chancellor to issue a subpoena to a certain witness to appear and declare the truth, setting forth that the "same Davyd will gladly knowelygge the treweth of the same matiers, bot he wald have a maundement fro yowe for the cause that he shuld noght be haldyn parcial in the same matier."

standing, acting under oath, from among persons of the neighborhood where the matter in question is supposed to exist or take place, men of property, indifferent between the parties, subject to challenge by both, acting under oath. They are informed of the controversy by the court, and the parties or their counsel, and their witnesses, and confer together afterwards privately and with deliberation, and return and give their answer publicly in court.<sup>1</sup> After this verdict, an aggrieved party, by the writ of attain, through the oath of twenty-four men of much better estate than the twelve, may convict the latter of a false oath, and subject them to the severest punishment. And then (c. 26), Fortescue sums up: "Here no one's cause or right fails by the death or failure of witnesses. No unknown witnesses are produced here, no paid persons, paupers, strangers, untrustworthy or those whose condition or hostility is unknown. These witnesses (*isti testes*) are neighbors, able to live out of their own property, of good name and unsullied reputation, not brought into court by a party, but chosen by an official who is a gentleman and indifferent, and required (*compulsi*) to come before the judge. These (*isti*) men know everything which the witnesses can depose; these (*isti*) are aware of the trustworthiness or untrustworthiness, and the reputation of the witnesses who are produced."

In this account it is obvious how great a figure that old quality of the jury still plays, which made them witnesses; it is the chief thing. The point of all this elaborate contrast is the greater number and better quality of the English witnesses, and the greater security there is in the impartial methods of procuring them. While they may be informed by other witnesses, produced by either party, yet they know already what is to be told them.

<sup>1</sup> Fortescue's statement of the mode of proceeding at the trial is too interesting to be omitted: "The whole record and process will be read to them [the twelve] by the Court, and the issue upon which they are to certify the Court will be clearly explained to them. Then each party, personally or by his counsel, in the presence of the Court, will state and show to the jurors all the matters and evidences which he thinks can instruct them as to the truth of the issue thus pleaded. And then each may introduce before the justices and jurors all the witnesses that he wishes to produce on his side, who, being charged by the justices on the holy evangelists of God, shall testify all that they know bearing upon the matter of fact (*probanda veritatem facti*) which is in controversy. If need be, these witnesses (*testes hujusmodi*) may be separated until they shall have deposed what they will, so that the saying of one shall not inform another, or stir him to the giving of like testimony." Thereupon the jurors go out and deliberate.

One remarks the small place that these informing witnesses have in the picture. The point of view here referred to clearly appears in what follows. By and by the prince is wholly satisfied of the excellence of the English law, one scruple only remaining. The Scriptures say that "the testimony of two men is true," and "bring with you one or two, so that in the mouth of two or three every word be established." If the Lord says two or three, why require more? No one can get any better or other foundation than the Lord has set. This is what troubles me a little, — *hec sunt, Cancellarie, que aliquantulum me conturbant*. The Chancellor is ready with his answer: If the testimony of two is true, *a fortiori* that of twelve should be thought true; according to the rule, *Plus semper in se continet quod est minus*. All that the Scriptures mean, he goes on, is that not less than two shall serve. "In no case can this mode of proceeding fail for lack of witnesses; nor can the testimony of witnesses, if there be any, fail of its due effect, etc."

Almost contemporaneous with Fortescue's book is the case of *Babington v. Venor*, in 1465,<sup>1</sup> in which, for the first time in the Year Books, we have something like a full report of the arguments and the putting in of the case before the jury. It was an assise of novel disseisin. Littleton for the plaintiff "shows in evidence" for the plaintiff a long story. Towards the end of it he says as to one point, "a man is here at the bar, an esquire, who spoke with her, &c. . . . and he will declare it. And also here is the general attorney of the Lord [Bishop] of W., who says in his Lord's name that, etc." There is nothing to show that either of these witnesses was actually put on. "Then Yong, for the defendant, shows evidence to the assise," — going on with another long story; and then, "The defendant's farmer is here at the bar ready to show to the Court (*al Court*) how, etc. . . . and this will the farmer declare to you, and also the rent-collector." Then he shows certain documents, nothing being said of any examination of witnesses as yet. Then Catesby, for the plaintiff, makes counter statements, *e.g.*, how the plaintiff entered, in the presence of several men here at the bar, etc., etc.; and he concludes by praying that the farmer may be examined. "The farmer came into Court and was sworn on a book to tell the truth to the Court as to that on which he should be examined; and he was examined by the court. . . .

<sup>1</sup> Long Quint (Edw. IV.) 58; s. c. Y. B. 5 Edw. IV. 5, 24. *Ante*, 316-17.



and he shows, etc. . . . And the rent-collector was also examined on a book as to this," etc.<sup>1</sup> Then Guy Fairfax, counsel for the plaintiff, tells another story as to what took place at the view. Then came some discussion on points of law. Then the judges suggested to the defendant's counsel that if they wished to rest upon the plaintiff's evidence not denied by them, they might discharge the inquest and demur upon the evidence; or if they were willing to run the risk of what the jury would say, the evidence might stand just as it was. The defendants preferred to go to the jury. Then came a discussion over a point of law, and then the charge: "Sirs, you have had much evidence from both parties. Do in this matter as God will give you grace and according to the evidence and your conscience. You will not be compelled to say, precisely, disseisin or the contrary, but you may find the fact, *i.e.*, the special matter, so as to give a special verdict on that and pray the judgment of the Court. And so go together, etc." The jury found for the plaintiff.

In passing from this matter of the ways of informing the jury, it must be remembered that although we have now reached modern methods, we are very far indeed from having reached the modern conception of trial by jury. Look, for instance, at Coke's ideas, a century and a half later, when he is explaining certain statutes as to treason and perjury (3 Inst. 26-7; *ib.* 163). The statutes of 1 Edw. VI. c. 12 and 5 & 6 *ib.* c. 11, had required two accusers (*i.e.*, witnesses), in order to a conviction of treason. And then a statute of 1 & 2 Ph. & M., c. 10, had enacted that all trials for treason should thereafter be "had and tried only according to the due course and order of the common law." Coke says that this last statute does not repeal the others, for it "extends only to trials by the verdict of twelve men *de vicineto*, of the place where the offense is alleged; and the . . . evidence of witnesses to the jury is no part of the trial, for by law the trial in that case is not by witnesses but by the verdict of twelve men; and so a manifest diversity between the evidence to a jury and a trial by

<sup>1</sup> One observes that only the defendant's farmer and rent-collector seem to have testified; all others are merely ready at the bar. Did the doctrine of maintenance operate to make it necessary for those having no special relation to a party to wait until the court or jury asked for them? This method may well have been favored as a rule of practice, from an unwillingness of the court to lengthen trials, — the statements of counsel as to what his witness had to say, accompanied by the production of these, serving in great part as a method of putting in evidence.

jury." "Albeit by the common law trials of matters of fact are by the verdict of twelve men, etc., and deposition of witnesses is but evidence to them, yet, for that most commonly juries are led by deposition of witnesses," etc. For an instance of a trial by witnesses, expressly contrasted with trial by twelve men, see the St. 5 & 6 Edw. VI. c. 4, s. 3, where, *inter alia*, one who should strike another with a weapon in a church or churchyard should lose an ear, or if he "have none eares," be branded, — if convicted by the verdict of twelve men, or by his own confession, *or by two lawful witnesses*.

4. As to the mode of controlling the jury and correcting their errors.

We have seen how the ways of adding to their knowledge were gradually increased, until at last witnesses called in by the parties were regularly admitted to testify publicly to these other witnesses, summoned by the viscount, whom we call the jury. This mounting witnesses upon witnesses was a remarkable result and teemed with great consequences. The contrast between the functions of these two classes became always greater and more marked. The peculiar function of the jury — as being triers — grew to be their chief, and finally, as centuries passed, their only one; while that of the other witnesses was more and more defined, refined upon, and hedged about with rules. It is surprising to see how slowly these results came about. The attain, which long held its place as the only way of remedying a false verdict, proceeded on the theory that the first jury had wilfully falsified, and so was punishable. An independent, original knowledge of the facts was attributed to the jury, and not an inferential and reasoned knowledge. So long as this theory was true and was really a controlling feature of a trial by jury, witnesses must needs play a very subordinate part. They were not necessary in any case. When they appeared the jury could disregard all they said; and should, if it were not accordant with what they knew. Gradually it was recognized that while the jury might not be bound by the testimony, yet they had a right to believe it, and that they were the only ones to judge of its credibility. It became, then, the chief question whether they had such evidence before them as justified their verdict. If they had, they were not punishable; if they had not, why punish

them for what perhaps they did not know? And so the attaint jury was not allowed to have more or other evidence making against the first jury's verdict than what that jury had had before them. But if they might believe what was thus testified to them it was equally true that they might disbelieve it, or a part of it; and an attainting jury must find it hard to say that it was a wilful falsehood, to go against a mass of evidence which *admitted* of being thought only partly true, or of being wholly disbelieved. The attaint grew unworkable. For one reason or another people were unwilling to resort to it, and jurors of attaint were unwilling to find the former jury guilty. In 1451 the inhabitants of Swaffham asked Parliament to annul a verdict and judgment in novel disseisin, alleging perjury in the jurors by reason of "menaces," and setting forth that the said inhabitants, for pity and remorse of their consciences, were loth to use a writ of attaint, since "the said assise durst not, for dread of the horrible menaces of the said Sir Thomas, otherwise do but be foresworn in giving their verdict in the same assise."<sup>1</sup> In 1565 Sir Thomas Smith<sup>2</sup> tells us: "Attaints be very seldom put in use, partly because the gentlemen will not meet to slander and deface the honest yeomen, their neighbors; so that of a long time they had rather pay a mean fine than to appear and make enquest. . . . And if the gentlemen do appear, gladlier they will confirm the first sentence, for the cause which I have said, than go against it." The Star Chamber was resorted to for the purpose of supplying the defects of the attaint and securing punishment for jurors who gave false or corrupt verdicts. The judges of the common law courts went a certain way in the same direction of fining and imprisoning jurors who went against the evidence. Of this I shall speak later. It is enough here to quote what Hudson says in his *Treatise on the Star Chamber*, written in the early part of the seventeenth century.<sup>3</sup> He is claiming for this court a very ancient jurisdiction; and after speaking of Henry IV. he adds: "When a corrupt jury had given an injurious verdict, if there had been no remedy but to attaint them by another jury, the wronged party would have had small remedy, as it is manifested by common experience, no jury having for many years attained a former."

<sup>1</sup> Draft of a petition from the town Swaffham, "Paston Letters" (Gairdner's ed.), No. 151.

<sup>2</sup> *Com. of Engl.*, Bk. 3 c. 2.

<sup>3</sup> *Collectanea Juridica*, ii. Hudson was not living in 1635.

In time courts adopted the method of granting new trials when the verdict was unreasonable, without punishing the jurors. A step had then been taken which made it important that the court should know, so far as possible, all that the jury knew; and accordingly the old doctrine of their going on private knowledge began more and more to give way. The jury were told that if any of them knew anything relating to the case, they ought to state it publicly in court. This lay long in the shape of a moral duty of the jurors, not enforceable; but after a time it was enforced, and the court assumed that, in general, nothing was known to the jury except what was publicly stated in court, adding to this (under the notion of judicial notice) what was known to everybody. This brought matters down to the state under which we are now living. The jury now had a duty to know nothing but what was publicly known and stated in court. They became merely judges upon evidence.

(a.) But let us turn back, and trace the working out of these results. For centuries the great check upon the jury was the attaint, *i.e.*, a proceeding in which the original parties and also the first jury were parties, and where a larger jury, made up of knights or other more considerable persons than the first, passed again on the same issue. If they found contrary to the first finding, then the first jury was convicted of perjury and heavily punished; and the first judgment was reversed. We see in one of our earliest cases<sup>1</sup> the punishment of a jury who, by confession of their leader and others, were adjudged to have perjured themselves, and also a reversal of the first judgment. It is probable that this consequence of punishment generally attended the proof of "perjury" in the use of the inquisition. But it is not probable that in the older law a reversal of the judgment would always follow. In Glanville there is no mention of the attaint, even as regards the possessory assises,<sup>2</sup> yet he says conspicuously that in the ordinance establishing the great assise, provision is made (*elegantèr inserta*) for the punishment of those who swear falsely.<sup>3</sup> But there seems

<sup>1</sup> Gundulf v. Pichot (1072-1082), Big. Pl. A. N. 34; s. c. *ante*, p. 253.

<sup>2</sup> Brunner (Schw. 422, note) remarks this.

<sup>3</sup> *Pena autem in hac assisa temere jurantium ordinaria est et ipsi regali institutioni elegantèr inserta*. Glanv. II. 19. He goes on to say that if the jurors are convicted of perjury (*perjurasse*) or confess, they lose all chattels and movables to the king, are imprisoned for at least a year, and that henceforth, losing their *legem*, they shall incur perpetual infamy. The point of the *elegantèr inserta* seems to be intimated when it

always to have been the same finality in the procedure by the grand assise as in the duel: *Ea enim que in curia . . . per duellum semel fuerint terminata negotia perpetuam habent firmitatem*. Glanv. II. 3. And so in the earliest extant Year Book, in 1292 (20 Edw. I. 18), the reporter has a memorandum, "Note: After the great assise an attaint never lies." The attaint (*convictio*) seems to have originated in England, but is not traceable to any extant legislation. Whether it may have been a part of the ordinances of Henry II. establishing the recognitions, or whether it developed from the *pena* mentioned by Glanville in speaking of the great assise, or whether it was granted in the discretion of the king and his justices, seems not to be ascertained. This at least is true, that while it is not in Glanville, and while the first express mention of it in legislation appears to have been in 1268, we find it in the judicial records as early as 1202, and it is fully discussed in Bracton half a century later.

On the other side of the channel, they had punishment for jurors who swore falsely. Brunner cites an undated capitulary of the eighth or ninth century (Schw. 89) which shows this. But the attaint went beyond this; it was a procedure which also secured the reversal of the previous verdict, as a proceeding for error in law secured the reversal of a judge's decision. This, we are told, was a thing unknown in Normandy. As regards the *stabilia*, the petitory action corresponding to the writ of right, Brunner quotes a Norman case of 1248, in which the jury by mistake gave a verdict in favor of one William, and the court gave judgment accordingly; whereupon the jury came back with the information: *Quod non bene dixerunt, quia Robertus maius ius habebat in terra illa quam W.* The court, however, would not change their judgment; William kept the land, and the jurymen had to pay Robert the value of it.<sup>1</sup> The same rule applied in other recognitions. Brunner cites

---

is added that this punishment is rightly imposed, in order that all who put forward a false oath in this sort of case — whether champion (Glanv. II. 3) or jurymen — may suffer a like punishment.

<sup>1</sup> Schw. 371. It would have been strange if this rigor had not existed in early days, when form bound every man by the exact words he uttered in court. This subject is illustrated in Brunner's essay on "Word and Form," in the old French procedure, published in the Proceedings of the Imperial Academy of Vienna, Vol. 77. A translation of this may be found in the "*Revue Critique de Legislation et de Jurisprudence*," (New Series), Vol. I. Of the formalism of the old law many traces yet remain, such as the necessity for using specific words in criminal pleading. One sees an authentic bit of it in 1284 in the Statutes of Wales, c. VIII. (St. Realm, i. 64), where it is said of certain

a record of about the year 1200, in which a litigant in Normandy gives the king (John) twenty besants that a recognition upon a recognition be not made in a certain case, *injuste et contra consuetudinem Normannie*. In England the continental rule held as regards the writ of right; in this the great assise ended the controversy as absolutely as the duel which it displaced. Whatever is settled in the King's Court by the duel, says Glanville (lib. ii. c. 3), is settled forever. And again (ii. c. 6), where a matter is settled by the great assise, *tam finaliter quam per duellum terminabitur negotium*. Yet, none the less, even here, as we have seen, was a punishment provided for perjury by the assise jury — that *pena eleganter inserta* already mentioned.

In 1227 (Br. N. B. ii., case 262) a certain prior had lost, in a writ of right of an advowson, — the great assise finding for the defendant, *quia non viderunt quod idem prior* or any of his predecessors presented a clerk at the church in question. Thereupon the prior came, alleged that there was a false oath, and put forward half a dozen charters which seemed to prove it. The defendant, relying on the finality of the former trial, simply declined to answer and demanded judgment. Yet the case seems to have been thought doubtful, for it was postponed, to give time for a conference with the king and with other justices. The prior did not appear at the day given, and the defendant had judgment. This seems to have been an irregular attempt at attainting the jurors of the great assise; for these jurors appear to have been summoned, and at the postponement the order was *et juratores sine die donec aliud audiverint*. The annotator also remarks upon the margin: "Note, that not easily may the jurors in the great assise be attainted": *Nota, quod juratores in magna assisa non poterunt convinci de facili*. In his treatise Bracton (290-290b) says that in all assises, except the grand assise, the *convictio* (attaint) lies; and for this exception he gives the very inadequate reason that the tenant has consented to the grand assise and cannot go back upon his own proof. The true reason appears to be merely that in this case the old law had not been changed.

---

real actions, that the demandant shall count in words that express the truth, without being subject to any challenge on account of words, — *sine calumpnia verborum, non observata illa dura consuetudine, qui cadit a sillaba cadit a tota causa*. See also the rigor which was customary before the statutes of jeofail, as indicated by Stat. 14 Edw. 3, c. 6. The curious discussions over this statute, in Y. B. 40 Edw. III. 34, 18, and 21 H. IV. 70, 4, are worth remarking.

The origin of the attaint in the possessory recognitions, is attributed by Brunner, reasonably enough, to the mere favor of the king (Schw. 372), and he refers to a case of 1347 or 1348,<sup>1</sup> in which a disappointed suitor offers the king twenty shillings for an attaint jury. Other early cases point the same way. The earliest one, so far as I observe, was in 1202 (Seld. Soc. Pub. iii., case 216), and there the defeated party offers the king forty shillings for a jury of twenty-four knights. In the same year (*ib.*, case 224), a like offer of twenty shillings is made.<sup>2</sup>

(*b.*) Not merely were the jurors punished for a false verdict, and this and any judgment upon it reversed: the judges also were punished for errors in law and their judgments reversed. The judges, according to the very old law, had to defend their judgment by the duel. The same ideas survive in our early records. In 1231 (Br. N. B. ii. 564), certain special justices who had taken an assise of mortdancestor between Oliver as demandant and William, a prior, as tenant, were summoned at the complaint of the tenant to record the proceedings, and the jurors to certify their verdict. The justices say that the jury found that Roger, a brother of Oliver, died seised of the land, and that Oliver was next heir, and so judgment was given for Oliver. The jurors were asked if this was the record. While admitting it in part, they said that Oliver had an older brother, Ralph, who was living, and therefore they had doubted whether Oliver was the nearest heir, and they set forth a former litigation as explaining their doubt. Oliver was then asked if this were so, and did not deny it. The justices, however, did deny it at first; but afterwards they admitted that the jurors said that Oliver had an older brother. Now, under these circumstances, according to a doctrine set forth by Glanville (vii, c. 1), while the younger

<sup>1</sup> Pl. Ab. 124, col. 2; cited by him from Biener, Eng. Geschw. i. 72.

<sup>2</sup> An attaint jury in 1203 is found in the same volume, case 150. Other early cases are in the Note Book; and several later ones in the Placitorum Abbreviatio, of various dates, between 1247 and 1312. In some the first jury is vindicated; in others they are convicted and judgment given reversing the former verdict. In the Revised Glanville, alluded to by Professor Maitland in Seld. Soc. Pub. iv. 6, and more fully explained by him in an article which is soon to appear in this Review, occurs a passage which I venture to extract. A Writ of Attaint is given, and then the writer (speaking a little later than Bracton, and not far, as it is supposed, from the year 1265) says that this writ is never given without pay, unless, by favor, to a poor person. (*Et sciendum quod istud predictum, brevis nunquam a Domino rege vel ejus justiciariis alicui conceditur sine dona, nisi de gracia, si sit pauper.*)

brother has a superior claim in a writ of right, yet he cannot maintain a mortdancestor, for the older brother, and not he, is the nearest heir. It was, therefore, wrong in the justices to give judgment for the younger brother. Accordingly it was now adjudged as follows; "Because the justices acknowledge that the jurors said that the said Oliver had an older brother named Ralph, and therein have absolved the jurors, and the justices adjudged that Oliver was the next heir on the ground that the said Ralph could not be *dominus et heres* whereas this (namely, being *dominus et heres*) has regard to *jus* and not to *possessio* or to the assise of mortdancestor, it is adjudged that the said justices erred in making that judgment, and made a false judgment; and therefore the justices are amerced, and the jurors go without day, and Oliver is amerced, and the prior recovers his seisin."<sup>1</sup>

(c.) It was sometimes found, in preparing to give judgment, that the verdict of the jury was obscure or incomplete; the judges below had not questioned them enough. In such cases they were resummoned to the court in banc *ad certificandum*. This was called the *certificatio*. One sees it in 1232 (Br. N. B. ii., case 887), and 1237 (*ib.* iii., case 1226). In 1290-1 (Pl. Ab. 284, col. 2, Suff.), one who had caused the jury to be resummoned for this purpose, being asked in what the jury had been insufficiently questioned or had spoken obscurely, answered by merely repeating their verdict, which he seems to say is wrong. His adversary replied that the verdict is not obscure, and for a plain verdict *non potest esse certificatio set potius attincta*; and she asks judgment and has it.

(d). The attainat at first was but a limited remedy, given only in assises, but it grew by statute and by the discretion allowed to the judges. The first mention of it in the statutes is a mere mention in 1268 (St. Marlebridge, 52 H. III. c. 14), cutting down general exemptions from serving on "assises, juries and inquests," in cases where necessity requires the service, — as it may, said the

<sup>1</sup> In 1235-6 (Br. N. B. iii., case 1166), there is a complaint to the king of an error, committed by the justices at Westminster, in giving judgment too quickly against a defendant on default, "whereas many distrains should follow . . . before the said Thomas should have recovered on the default." The justices appeared and admitted the facts, but pleaded ignorance, *nesciverunt in dicto negocio melius procedere*. The judgment was reversed. There was no jury in this case, and nothing is said of any punishment of the judges; "but observe," says Maitland in his note (vol. iii, p. 179) "that proceedings in error are a complaint against the judges who have erred."



statute, in the great assise, or where the party is a witness to a deed, *aut in attinctis*, etc. In 1275 (St. West. I. 3 Edw. I. c. 38) it is recited that people lose their estates because some "doubt not to make a false oath;" and it is enacted that, on inquests in pleas of land or freehold or what touches freehold, the king, *de son office*, when it shall seem needful shall hereafter give attaints.<sup>1</sup> This statute is supposed to have extended the remedy beyond the case where the assise jury answered merely on the point of the assise, to that where it answered on incidental or newly developed questions, *in modum juratae*, and to all juries in real actions. In 1302 (Y. B. 30 and 31 Edw. I. 124) Berewik, J. calls on the assise in novel disseisin to tell him the damages, and warns them that there may be an attaint for damages as well as the principal matter, "and out of this Court, without the need of seeking it in the Chancery." This seems to rest on the statute of 1275; at common law, the rule is given by Bracton (290b), *de damnis nulla erit convictio sed . . . locum habet certificatio*.

The Mirror, early in the fourteenth century, wished attaints extended and made easier: "It is an abuse that attaints are not granted without difficulty in the Chancery to attaint all false jurors, as well in all other actions real, personal and mixed, as in assises" (c. 5, s. 1, 77). Before Horne's death<sup>2</sup> there came an instalment of this desired reform. In 1326-7 (St. 1 Edw. III. c. 6) after a recital of "great mischiefs, damages and destructions of divers persons, as well as of the men of holy church by the false oath of jurors in writs of trespass," the writ of attaint is allowed for the principal matter and also for damages in trespass, and the chancellor is to grant such writs *sans parler au Roi*. In this fast-breeding action of trespass, the writ of attaint was further extended in 1331 (St. 5 Edw. III. c. 7), to cases where the

<sup>1</sup> "Not that the king shall grant these writs whenever applied for, *ex merito justitiae* [Coke's view, 2 Inst. 237], (a sense which the words *ex officio* surely never bore in any writer of Latin, whether good or bad), but that the king shall *ex officio*, without being sued and applied for, grant," &c. Reeves, Finl. ed. ii. 34. And so in 1292 (Y. B. 20 & 21, Edw. I. 110) Spigornel (counsel) says: "We understand, sir, that no attaint shall pass upon an inquest without the special order of the king;" and in 1294 (Y. B. 21 & 22, Edw. I. 330) the reporter has a note "that justices itinerant may grant attaints upon assises which pass before them, but not on inquests." Coke (2 Inst. 130) thinks that the attaint lay at common law in pleas both real and personal—a view which Reeves justly discredits (ii. 33).

<sup>2</sup> Which was in 1328. Black Book of the Adm. i. Introd. lix., note.

proceeding was informal and without writ, if the damages pass forty shillings; and then in 1354 (St. 28 Edw. III. c. 8) it was enacted that "the writ of attaint be granted without regard to the amount of damages, as well upon a bill of trespass as upon a writ of trespass."<sup>1</sup>

Earlier than this, in 1347 (Parl. Rolls ii. 167, 23), the commons had petitioned for the attaint in writs of debt and all other writs and bills where the demand or damage amounted to forty shillings, but the answer came, "Let the old law stand till the King be better advised." At last, in 1360 (St. 34 Edw. III. c. 7), came full relief in a statute providing, "against the falsehood of jurors, that every man against whom they shall pass may have the attaint both in pleas real and personal."<sup>2</sup> Later in the fourteenth century the benefit of the attaint was extended in other ways, *e. g.*, by giving it to a reversioner when the life tenant had lost.

(*c*) The attaint was now a general remedy, for litigants in the King's Courts, but it was found to be a very inadequate one. The next century is full of complaints, loud, bitter, and constant, of the wretched working of the jury and the attaint; perjury, bribery, and ruinous delays are set forth as inducing the increase of the property qualifications of jurors, and imposing new penalties upon them. Two remarkable statutes, of 1433 and 1436 respectively,<sup>3</sup> must be noticed. The first recites mischief, damage, and disherison from "the usual perjury of jurors," increasing by reason of gifts made them by the parties to suits, so that the greater part of people who have to sue (*quont a suc'r*) let go (*lessent*) their suits by reason of the said mischief and especially on account of the

<sup>1</sup> A "bill" was merely an informal document. In the "Paston Letters" the word is constantly used for a letter; *e.g.*, in No. 813 (1478) Sir John Paston's mistress writes that she is in good health "at the making of this sympyll byll," and asks for an answer by "the brynger of my byll." So in 1440-1 (Y. B. 19 H. VI. 50, 7), Paston J.: If a bill be good in substance it is enough; *car un bill n'ad aucun forme*. In 1315 (Y. B. Edw. II. 277) a party had averred by Domesday Book, and a mandate was issued by Bereford, C. J., to the treasurer and barons of the exchequer, to certify as to the contents of Domesday. They would not certify, because the mandate was only *un bille* sealed with the seal of William de Bereford; whereupon the latter sent a writ (*brief*), and this brought an answer. Reeves, Hist. C. L. Finl. ed. ii. 97, note; ib. 99, note.

<sup>2</sup> The statute goes on: "And that the attaint be granted to the poor who shall *offer* that they have nothing wherefrom to pay therefor except their *counenance*, without payment (*fine*), and to all others by an easy payment."

<sup>3</sup> St. 11 H. VI. c. 4, and St. 15 ib. c. 5. For the corresponding petitions in Parliament and the answers, see Parl. Rolls, iv. 408, ib. 448 (47), and ib. 501 (26).

delays in writs of attaints. When the grand jury appears and is ready to pass, a tenant or defendant or one of the petty jury pleads false pleas not triable by the grand jury, and so delays proceedings until this be tried. When this is settled for the plaintiff, another pleads a like false plea since the last continuance ; and so each of the defendants, tenants, or jurors, one after another, may plead and delay the grand jury ; and, although all be false and feigned, the common law has no penalty. This has caused great vexation and travail to the grand juries, and plaintiffs have been so impoverished that they could not pursue their cases, and jurors are more emboldened to swear falsely. It is, therefore, ordained that plaintiffs may recover [against] all such tenants, jurors, and defendants the damages and costs thus suffered. The other statute, after reciting that by the law of the realm trials in matters of life and death and as to all sorts of questions, as regards matters of fact (*touchant matiers en fait*), are likely to be "by the oaths of inquests of twelve men ;" that great, fearless, and shameless perjury horribly continues and increases daily among common jurors of the realm ; that in proportion as men are more sufficient in land, the less likely they are to be corrupted ; that in every attaint there must be thirteen defendants at least, unless some die, each of whom may have separate answer triable in any county, and the attaint may be delayed until all these are tried, and so delays to the plaintiffs in the said attaints for ten years *par commune estimation*,—goes on to provide for an increase of the property qualification of the attaint jurors, and that an adverse decision in any "foreign plea," [*i.e.*, one triable elsewhere than the issue in attaint] shall give the whole attaint against the one pleading it.

But not only was the machinery of the attaint jury cumbrous and well adapted to delays and frauds, but the attaint jurors were unwilling to find the petit jurors guilty, the punishment was so harsh. Now that witnesses were produced before a jury and they were expected to judge of the truth or falsity of the witnesses, things had changed. The essential nature of their own function as being something different from that of these new witnesses, something more than being mere testifiers to what they had seen and heard, as being always in a degree *judges*, drawing conclusions from what their senses presented and what others testified to them,—all this must have rapidly grown plain ; and

so the extreme severity and unfitness of the punishment. The punishment mentioned by Glanville (lib. ii. c. 19) three centuries before continued to be applied in the attainr, and was even increased; the convicted juryman lost all his movable goods to the king; he was imprisoned for a year at least; he lost his *lex terrae* and became infamous. Bracton (292*b*) repeats this in substance, making their lands and chattels seized by the king until redeemed, and adds, "Never thereafter may they be received to an oath for they shall not afterwards be *othesworth*." It came also to be expressed as a part of the judgment that their wives and children should be turned out of doors, and their lands laid waste.

The wisdom of providing some milder punishment was seen. Accordingly in 1495 (St. 11 H. VII. c. 21) in providing the attainr for the first time, in the case of inquests in London, the punishment is limited to a fine of twenty pounds, "or more, by the discretion of the mayor or aldermen," imprisonment for six months or less, and "to be disabled forever to be sworn in any jury before any temporal judge." In the same year (*ib.* c. 24) there is a general statute which was afterwards continued several times, and then, having expired, was temporarily revived in 1531, by St. 23 H. VIII. c. 3, and finally made perpetual in 1571 by St. 13 Eliz. c. 25.<sup>1</sup> It continued in substance to be the law governing this matter until the abolition of attainrs in 1825. This statute after the usual recital of continuing perjury [of jurors] and its mischiefs, provides that a party grieved by an untrue verdict, where the demand and verdict reach forty pounds shall have an attainr jury of the same number as heretofore. The petit jury shall (with certain exceptions) have no answer except that their verdict was true. If the issue be found against them they shall be fined twenty pounds, one-half for the king, the other for the party suing. They shall also "make fine and ransom by the discretion of the justices;" and they "shall never after be of any evidence, nor their oath accepted in any court." The party may plead any good bar to the attainr, but that is not to delay the trial of the petit jury's plea and issue. If the party's plea, whatever it be, is found against him, then the plaintiff in attainr is "to be restored to that he lost with his reasonable costs and dam-

---

<sup>1</sup> "Made in favor of the subjects, namely, for the qualification of the rigorous and terrible judgment of the common law in attainr," said the court in *Austen v. Baker*, Dyer 201*a* (1561).

ages." If the verdict be in a personal action and under forty pounds, the qualifications of the attaint jury are less, and the fine shall be only five pounds.

(*f.*) The statutes of Henry VII. however did not repeal the old common-law attaint. "So that," says Blackstone (Com. iii. 404), "a man may now bring an attaint either upon the statute or at common law, at his election, and in both of them reverse the former judgment." Either way the punishment was very severe; and it plainly appears that this, with other causes, was working fast to make the attaint wholly inoperative. I have referred to the "pyte and remorse of their concyencez" which kept the people of Swaffham, in 1451, from bringing a writ of attaint ("Paston Letters," No. 151); and to a part of what Sir Thomas Smith (Com. of England, Book iii. c. 2) said in 1565; "Attaints be very seldom put in use, partly because the gentlemen will not meet to slander and deface the honest yeomen, their neighbors, so that of a long time they had rather pay a mean fine than to appear and make the inquest. And in the meantime they will intreat, so much as in them lyeth, the parties to come to some composition and agreement among themselves; as lightly they do except either the corruption of the inquest be too evident, or the one party is too obstinate and headstrong. And, if the gentlemen do appear, gladlier they will confirm the first sentence for the causes which I have said than go against it." A century later, in 1665 (1 Keble, 864, 6), Hyde, C.J., "seeing the attaint is now fruitless," declared with vehemence in a civil case that jurors ought to be fined. And after another century, Blackstone said (Com. iii. 404), "I have observed very few instances of an attaint in our books later than the sixteenth century." "The writ of attaint," said Lord Mansfield in 1757,<sup>1</sup> "is now a mere sound in every case." In 1825 (St. 6 Geo. IV. c. 50, s. 60) it was at last enacted that in all cases attaints should "henceforth cease, become void and be utterly abolished."

A case or two will illustrate the working of the attaint in its decrepitude. In 1542,<sup>2</sup> more evidence for the plaintiff in attaint had in fact been given to the attaint jury than was given below; but this was held to be wrong, and Shelley, J. "admonished the jury to look to the evidence which was given to the first

<sup>1</sup> *Bright v. Eynon*, 1 Burr. p. 393.

<sup>2</sup> *Rolle v. Hampden*, Dyer, 53*b*.

jury upon which they passed; for if they had pregnant and manifest proof and evidence to confirm the matter, although that were in fact false and the truth of the matter was contrary, still they ought not to regard that, but ought to weigh in their consciences what themselves would have done upon the same strong evidence as the first jury did; for *homines sunt mendaces et non angeli*," etc. In 1593,<sup>1</sup> the attain jury gave a special verdict.<sup>2</sup> The defendant in a *qui tam* action had been charged with buying cattle out of market, viz., of one Pearepoint. On a plea of not guilty the jury below had found for the defendant. On attain, the twenty-four in their special verdict set forth that the petit jury had the evidence of one Whitworth that the defendant bought of him, out of market, the cattle of Pearepoint. The attain jury finds that the cattle were really bought of Whitworth as Whitworth's cattle; but this was not given in evidence, and they ask the Court's judgment as to the law. The Court holds against the attain; since the jury finds that the evidence below was false in part, the first jury might properly enough disbelieve it all.

(g.) Of course it must be remembered that there were other grounds for punishing juries, and other grounds for giving new trials. The Court always held towards the jury a relation of control, and the books are full of traces of ordinary discipline. In an early case<sup>3</sup> the jury appeared to be answering subtly, so as to conceal something. The judge calls for a better answer, or he will shut them up over night. If the jurors took out food with them, or violated any of the ordinary rules, they were always subject to punishment; and in such cases new trials were granted.<sup>4</sup>

<sup>1</sup> *Queen v. Ingersall*, Cro. El. 309.

<sup>2</sup> A proceeding formerly said not to be good, but sustained in 1561; *Burnham v. Heyman*, Dyer, 173.

<sup>3</sup> In 1293 (Y. B. 21 and 22 Edw. I. 273) in an assise of mortdancestor, a tenant set up the existence of an older heir, William, and an alienation by him. The jury found that this William entered as oldest son and heir, and as next heir. "Roubury [J.] How say you that he is next heir? The Assise. Because he was born and begotten of the same father and the same mother, and his father on his death-bed acknowledged that he was his son and his heir. Roubury [J.] You shall tell us in another fashion how he is next heir, or stay shut up, without food and drink, till to-morrow morning. And then they said that he was born before the ceremony [of marriage] and after the betrothal." This, at common law, made him a bastard.

<sup>4</sup> "There are instances in the Year Books of the reigns of Edward III. Henry IV. and Henry VII. of judgments being stayed (even after a trial at bar), and new *venires* awarded, because the jury had eat and drank without consent of the Judge, and because the plaintiff had privately given a paper to a jurymen before he was sworn." Bl. Com. iii. 387-8).

Not a few statutes also were passed, especially in the fourteenth century, giving actions or criminal process against jurymen receiving bribes and taking part in embracery. Of other less obvious but extremely important modes of controlling the jury and their consequences, I have spoken before,<sup>1</sup> and need not now repeat.

(*h.*) It will have been noticed, perhaps, that we find nothing of the attaint for a false verdict in criminal cases. At the beginning we saw that there was no assise, *i. e.*, no statutory jury, in such cases, and it seems to have been only in assises that the attaint was first allowed. The jury in criminal cases came in gradually, and by way of the consent of the accused, willing or forced. (*ante*, p. 265, *et seq.*) The doctrine, in all cases where one had consented, was that such party could not have the attaint, for this would be *facere probationem suam nullam*. (Bracton, 209*b*). The King, however, it was said, might have the attaint if the case went against him. Bracton (*ibid.*) tells us this, and four hundred years later we read it in Sir M. Hale.<sup>2</sup> But the silence of the books as regards actual cases of the exercise of this power in criminal cases may lead us to some doubt about it. The words of Bracton are satisfied by such cases as those relating to the King's revenues, and such as the *qui tam* action of 1593 (*ante*, p. 376). As regards appeals, the common law mode of trial was by battle. It is, perhaps, reason enough for denying the attaint to the plaintiff in an appeal, that historically the battle was a final thing, and here, as in the grand assise, whatever trial took the place of it partook of this character.<sup>3</sup> One other remark may be made as regards

<sup>1</sup> "Law and Fact in Jury Trials," 4 Har. Law Rev. 159-169.

<sup>2</sup> P. C. ii, 310 (written 1660-1676), citing Fitz. Attaint, 60: s. c. ib. 64; but this is contemporaneously denied by Vaughan, C. J., in *Bushel's Case* (Vaughan, 146), in 1670; "For there is no case in all the law of such an attaint, nor opinion, but that of Thirning's, 10 H. IV. . . . for which there is no warrant in law, though there is other specious authority against it." What Thirning, C. J. (Vaughan's predecessor at the head of the Common Bench), is shortly reported to have said, in 1409, is this: "One indicted of trespass and found guilty by the other inquest shall not have attaint nor a petition in the nature of attaint, because in a way (*en maner*) twenty-four have given the verdict (*i. e.*, two juries), and the two verdicts agree; but if he be acquitted the King shall have attaint by prerogative." This reason, as to two verdicts, was probably invented (although one sees it in the Year Books), and not the true historical reason.

<sup>3</sup> And the attaint was not extended by statute to appeals. In 1347-8 (Lib. Ass. 102, 82), in an appeal of mayhem, "Thorpe [J.], said that the defendant should never have attaint in an appeal of mayhem, any more than in a felony; for the statute gives attaint only in a writ of trespass and a bill of trespass." Not only, then, was it true, as Britton said (l. 49), that, "for avoiding the perilous risk of battle, it is better to proceed by our writs of trespass, than by appeals," but one got the benefit of the attaint in that way.

all criminal cases. Always scope was allowed to the sentiment that there should be mercy and caution in such cases. We read in a report of 1302 (Y. B. 30 and 31 Edw. I. 538,) *Et hoc nota quod melius est nocentem relinquere impunitum quam innocentem punire*;<sup>1</sup> and so Fortescue (*De Laudibus*, c. 27): "Truly I would rather that twenty guilty men should escape through pity than that one just man should be unjustly condemned;" in this chapter he celebrates the felicity of the English in having so many safeguards against injustice in criminal trials. But even in England the King, in criminal cases, was no mere ordinary party to an action; the procedure was heavily weighted in his favor. In treason and felony the accused could not have counsel; later, when witnesses could be had for the King, he could not have them; and still later, when he also could have them, his witnesses could not be sworn; The King, therefore, had small need of the attain in criminal cases; and the doctrine was ancient that one should not be twice put in jeopardy for the same offence.

How then were juries kept in check in such cases? Probably the influence of the crown was sufficiently strong to prevent much injustice as against the prosecution. On the other side, the natural sympathy of the jury with accused persons, and the operation of humane maxims and sentiments, secured a tolerable fairness. And, no doubt, the judges disciplined the jury in one way or another. An early instance of this, in 1302, is found in Y. B. 30 and 31 Edw. I. 522. One was indicted for homicide and proved that he had been previously acquitted of the same death; it was found by the rolls that it was as he said, and that he had the King's writ *de bono et malo*. It was adjudged that he should go quit, and that five of the [indicting] inquest should go to prison as "attainted," and that the viscount should take their lands and chattels into the King's hands. Berewyk, J., goes on to make some remarks which appear to mean (the text seems corrupt) that while these men cannot be attained (*i.e.*, convicted) by a jury of twenty-four, yet they are attained out of their own mouths, for they were on the inquest which formerly acquitted this man of the death, and now on a jury which accuses him of it. It is added by the reporter that the justices were the harder on them because they couldn't suggest any one else as guilty. So, in 1329 (Fitz. Cor. 287), a jury was amerced for undervaluing certain goods.

<sup>1</sup> From the Digest, 48, 19, 5: *Divus Traianus . . . rescripsit, satius enim esse impunitum relinqui, etc.*



When the criminal jury came to hear the evidence of witnesses, this method of punishing them seemed hardly less out of place than the attainder in civil cases. It could not last, but it was hard to give it up. In 1500, for refusing to convict on what was regarded as sufficient evidence, the jury were imprisoned until they gave a bond to appear before the King and Council, and were then fined eight pounds apiece, but Sir Richard Empson was afterwards punished for this.<sup>1</sup> The fining and imprisonment of jurors had, indeed, been authorized by the statute 26 H. VIII. c. 4, but only in a particular place, *vis.*, in "Wales and the Marches thereof." Certain irregularities in those parts were recited, and these punishments were authorized in case of acquittal or giving "an untrue verdict against the King, contrary to good and pregnant evidence ministered to them by persons sworn before the justices," etc. Vaughan, in *Bushel's case*, draws the inference from this statute that this treatment would not be legal without it, or where it did not extend. But the Star Chamber accounted it legal enough for them. "In the reigns of H. VII. H. VIII. Queen Mary, and the beginning of Queen Elizabeth's reign," says Hudson in his *Treatise on the Star Chamber* (s. vii.), "there was scarce one term pretermitted but some grand inquest or jury was fined for acquitting felons or murderers; in which case lay no attainder." In *Throckmorton's case*, in 1554,<sup>2</sup> the jury acquitted the accused of treason after his vigorous and shrewd defence of himself. "The Court being dissatisfied with the verdict, committed the jury to prison. Four of them afterwards made their submission, and owned their offence . . . and were delivered; . . . but the other eight were detained . . . and on the 26th of October [the trial was on April 17] were brought before the Council in the Star Chamber. The Lords, extremely offended at their behavior," sentenced the foreman and another to pay £2,000 apiece within a fortnight, and the other six a thousand marks each, and all were sent back to prison. On December 12, five jurors were discharged on paying £220 apiece, and nine days later the rest on paying £60 apiece.

We may see how the whole matter was regarded by a sagacious and well-informed statesman, only ten or eleven years after *Throckmorton's case*, in *Smith's Commonwealth of England* (Book III.

---

<sup>1</sup> *Hardres*, 98-9.

<sup>2</sup> *How. St. Tr.* 869; *s. c.* 1 *Jardine's Crim. Trials*, 62.

c. 1). If, he says, a jury improperly find a man guilty, the judges moderate this by reprieving and recommending a pardon. "If, having pregnant evidence, nevertheless, the twelve do acquit the malefactor, which they will do sometime, . . . the prisoner escapeth, but the twelve not only rebuked by the judges, but also threatened of punishment. . . . But this threatening chanceth oftener than the execution thereof. Yet I have seen in my time, but not in the reign of the queen now,<sup>1</sup> that an inquest for pronouncing one not guilty of treason contrary to such evidence as was brought in, were not only imprisoned for a space, but an huge fine set upon their heads; . . . another inquest for acquitting another, beside paying a fine of money, put to open ignominy and shame. But these doings were even then by many accounted very violent, tyrannical, and contrary to the liberty and custom of the realm of England. Wherefore it cometh very seldom in use; yet so much at a time the inquest may be corrupted that the prince may have cause with justice to punish them, for they are men and subject to corruption and partiality as others be."

We are told (Moore, 730-1) of many precedents in the Court of Wards for punishing juries who refused to find as directed by the Courts, and the reporter specifies five of them running from 1571 down to 1597, "this Easter term 39 Eliz." In 1600,<sup>2</sup> in an appeal of death, the foreman and seven others of the jury were heavily fined, but there was here an element of real misconduct, besides going against the instructions of the Court. In 1602,<sup>3</sup> for acquitting of murder, the jury were "committed and fined and bound to their good behavior," and the reporter does not omit to mention that Popham, Gawdy, and Fenner (the judges) *fuertunt valde irati*. In 1664,<sup>4</sup> six of a jury were fined for refusing "to find certain Quakers guilty according to their evidence." In 1665,<sup>5</sup> we are told that the twelve were fined one hundred marks apiece for acquitting certain persons of unlawfully attending conventicles. Hale (P. C. ii. 312) makes it five marks apiece, and states that "it was agreed by all the judges of England (one only dissenting) that this fine was not legally

<sup>1</sup> He was writing in Elizabeth's seventh year. Throckmorton's trial was in Queen Mary's first year.

<sup>2</sup> *Watts v. Braines*, Cro. El. 778.

<sup>3</sup> *Wharton's Case*, Yelverton 243, s. c. *Noy*, 48.

<sup>4</sup> *Leach's Case*, T. Raymond, 98.

<sup>5</sup> *Wagstaffe's Case*, Hardres, 409; s. c. 1 Sid. 372.

set upon the jury, for they are the judges of matters of fact, and although it was inserted in the fine that it was *contra directionem curiæ in materia legis*, this mended not the matter, for it was impossible any matter of law could come in question till the matters of fact were settled, and stated, and agreed by the jury, and of such matters of fact they were the only competent judges."<sup>1</sup> This appears not to have been an actual decision, for the thing continued. The dissenting judge was probably Kelyng. Had the judges met a little earlier there would have been another dissenter, *vis.*, Chief Justice Hyde, who died on the first of the same May wherein Wagstaffe was punished. What his opinions were may be seen in a civil case just before, on "Friday, April 14" (1 Keble, 864), where in arranging for a new trial in a case where a verdict had been given contrary to evidence, he "ordered the sheriff should return a good jury in the new trial;" and the reporter adds, "Hyde, Chief Justice, conceived jurors ought to be fined if they would go against the Hare [law?] and direction, take bit in mouth and go headstrong against the Court; and said, that by the grace of God he would have it tried, seeing the attainr is now fruitless." The ardor of these expressions may be understood from what this same judge had done before, and the reception his action had met with. He had, in fact, in a civil case, fined the jurors five pounds apiece three years before, but the exchequer judges had refused to enforce the fine as being illegal, and "the greater part of the rest of the judges" had agreed with them.<sup>2</sup> The doctrine that wherever an attainr will lie upon a verdict (*i.e.*, in all civil cases, at any rate) it is illegal to fine or imprison, is laid down in Bushel's Case in 1670,<sup>3</sup> and is referred to the case where Hyde had fined the jury "All the judges have agreed upon a full conference at Serjeant's Inn in this case. And it was formerly so agreed by the then judges in a case where Justice Hyde, etc., . . . that a jury is not finable for going against their evidence where an attainr lies . . . for it may be affirmed and found upon the attainr a true verdict."

<sup>1</sup> Hale's book is supposed to have been written in 1660-1676. It was not printed for sixty years after his death.

<sup>2</sup> Hale, P. C. ii. 160, 311. Certain distinctions between the authority of different judges and different courts, I do not consider; see Hale, P. C. ii. 310-13.

<sup>3</sup> Vaughan, pp. 144-5.

In criminal cases, fining was still kept up. In 1666 (Kelyng, 50) Kelyng, the new Chief Justice, fined a jury five pounds apiece for a verdict of manslaughter where he had directed them that it was murder; "but after, upon the petition of the jurors, I took down their fines to 40 s. apiece, which they all paid." In 1667,<sup>1</sup> Kelyng fined eleven of the grand jury 20 pounds apiece for refusing to indict for murder, and the Judges of the King's Bench held this good. The reporter makes the judges add, "And when the petty jury, contrary to directions of the Court, will find a murder manslaughter . . . yet the Court will fine them. But," adds the reporter, "because they were gentlemen of repute in the country, the Court spared the fine; yet in Parliament the Chief Justice was fain to submit, being by Sir H. W[indham] accused."<sup>2</sup> And finally at the old Bailey, in 1670, the jurors who acquitted William Penn and William Mead on a charge of taking part in an unlawful assembly, etc., were fined and imprisoned. But on habeas corpus in the Common Pleas,<sup>3</sup> they were discharged, and Vaughan, C.J., pronounced that memorable opinion which ended the fining of jurors for their verdicts, and vindicated their character as judges of fact. "A witness," he says, "swears to but what he hath heard or seen; generally or more largely to what hath fallen under his senses. But a jurymen swears to what he can infer and conclude from the testimony of such witnesses by the act and force of his understanding to be the fact inquired after."<sup>4</sup> As regards the charge that the jury went against the instruction of the Court in law,—a court, Vaughan says, does not charge a jury with matter of law in the abstract, but only upon the law as growing out of some supposition of fact. This matter of fact is for the jury; it is not for the judge, "having heard the evidence given in court (for he knows no other)," to order the jury to find the

<sup>1</sup> King v. Windham, 2 Keble, 180.

<sup>2</sup> For the proceedings in the House of Commons see 6 How. State Trials, 993. The House appears to have passed a resolution (after hearing the Chief Justice in his own defence) condemning the fining or imprisoning of jurors as illegal. But a bill which was brought in to the same effect did not pass the House.

<sup>3</sup> Bushel's case, Vaughan, 135. S.C. 6 How. St. Tr. 999; for Penn and Mead's Case see ib. 951. Vaughan's opinion, as it has come down to us, is evidently in the form of an unfinished draft.

<sup>4</sup> "A verdict," says Lee, C. J., in 1738 (Smith d. Dormer v. Parkhurst, Andrews, 322), "is only a judgment given upon a comparison of proofs." When we read that, we are aware of a wholly modern atmosphere.

fact one way rather than the other; for if he could, "the jury is but a troublesome delay, great charge, and of no use." The judge cannot know all the evidence which the jury goes upon; they have much other than what is given in court. They are from the vicinage, because the law supposes them to be able to decide the case though no evidence at all were given in court on either side. They may, from their private knowledge of which the judge knows nothing, have ground to discredit all that is given in evidence in court. They may proceed upon a view.<sup>1</sup> "A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning." It is absurd that a judge should fine a jury for going against their evidence, when he knows but part of it, "for the better and greater part of the evidence may be wholly unknown to him; and this may happen in most cases, and often doth, as in *Grandby and Short's Case*."<sup>2</sup>

(i.) Two things stand out prominently in Vaughan's opinion in *Bushel's Case*: 1. The jury are judges of evidence. 2. *They act upon evidence of which the Court knows nothing*; and may rightfully decide a case without any evidence publicly given for or against either party. It was now two hundred years since Fortescue wrote his book and showed witnesses testifying in open court to the jury; and as we see, not yet has the jury lost its old character, as being in itself a body of witnesses; indeed, it is this character, and this fact that the judge cannot know the evi-

<sup>1</sup> For the modern way of dealing with this matter of the view see *Tully v. Fitchburg R. R. Co.*, 134 Mass. 499, 503. As regards difficulties that some courts have felt in harmonizing the function of the court in setting aside verdicts, with that of the jury in acting upon a view and in dealing with the evidence of experts, see *Topeka v. Martineau*, 42 Kansas, pp. 389-91; *Hoffman v. R. R. Co.*, 22 Atl. Rep. p. 826; *Parks v. Boston*, 15 Pick. pp. 209-11, and the excellent remarks of Shaw, C.J., in *Davis v. Jenney*, 1 Met. pp. 222-3

<sup>2</sup> Cro. El. 616 (1598). *Bushel's Case* marks the end of the whole anachronism of punishing jurors for their verdicts as being against evidence; for, although the attainder was not abolished until 1825, it was but a name. Yet Vaughan's successor, Sir Francis North, afterwards Lord Keeper, did not at all like this result. In that delightful book, "*The Life of the Lord Keeper Guilford*," his brother, Roger North (i. p. 131), preserves a remark by the Lord Keeper that the doctrine "that juries cannot be fined for slighting evidence and directions [is] contrary to reason and the whole course of precedents." Roger North adds, "This was popular, and the law stands so settled. The matter is trust, whether the Court or jury. The Court may abuse a trust in an undue punishment of jurymen, as in any other acts of justice; and on the other side, juries may abuse their trust . . . The precedents run all for the trust on the side of the Court; what reason to change it (which was changing the law) but popularity."

dence upon which they go, that make one of the chief pillars upon which Vaughan's great judgment rests. This double character of the jury was no novelty. As we have seen, the jury had much evidence long before the parties could bring in their witnesses, and in so far as they acted on evidence they were always judges. This side of their function had been slowly growing, until now it was a great, conspicuous thing. But the old one had not gone; that also continued a great and leading part of their function. Yet it had begun to diminish, and by the end of another century it would be mainly gone.

(j.) As things stood after *Bushel's Case*, how should the jury be controlled? The attain was obsolete, and fining and imprisonment were no longer possible. In no way could they be punished for giving verdicts against law or evidence. The courts found a remedy in their very ancient jurisdiction of granting new trials in case of misconduct. If a jury should accept food from one of the parties while they were out, or should take from him a paper not delivered to them in court, and should afterwards find for him, the court would refuse judgment, and grant a new *venire*. Why not, then, if the jury should go plainly counter to law, or should give an irrational, absurd, or clearly false verdict, do the same thing? This was done. It was hazardous, for it was, in some cases, undertaking to revise the action of the jury in a region belonging peculiarly to them, and was going beyond anything that had formerly been done. Moreover, how should the court know that the jury's verdict was against evidence? And how should they know what the law was until they knew what the facts were, since the law, as applicable to the case, was inextricably bound up with some definite supposition of fact? Evidently the keen arguments of Vaughan's opinion were applicable also to the granting of new trials, for going against law and evidence. But the step had been taken at least as early as the first half of the seventeenth century.

In order to make it effective it was necessary to accompany this practice by an endeavor to make the jury declare publicly their private knowledge about the cause. This effort prospered but slowly. The old function of the jury was too deeply ingrained to give way in any short time; the judges long contented themselves with advice, with laying it down as a moral duty that the jury should publicly declare what they knew. But while the jury's right to go upon their private knowledge was emphatically recog-

nized in 1670, and continued to be allowed in the books well on into the next century, yet the enlarged practice in granting new trials, and the growth and development of it in the seventeenth and eighteenth centuries, was steadily transforming the old jury into the modern one; and at last it was possible for the judges to lay it down for law that a jury cannot give a verdict upon their private knowledge.<sup>1</sup>

(k.) Let me now run over a few of the cases relating to the new way of controlling the jury. The first reported case of the modern new trial is said (I suppose truly) to be that of *Wood v. Gunston* in 1655 in the "Upper Bench" (Style, 462). The jury, in an action for calling a man a traitor, had given fifteen hundred pounds damages; a motion was made to set this aside as excessive, and give a new trial. It was granted after full debate; Glynne, C.J., saying, "If the Court do believe that the jury gave a verdict against their direction they may grant a new trial." It is probable, although this is the first case that got reported of allowing a new trial for the modern reasons, that it was not the first decided. Indeed, Holt, C.J., in 1699, says, in *Argent v. Sir Marmaduke Darrell* (Salk. 648), where a new trial was moved for in a trial at bar, on the ground that the verdict was against evidence:

"The reason of granting new trials upon verdicts against evidence at the assises is because they are subordinate trials appointed by the Statute West. II. c. 30. . . . And there have been new trials anciently, as appears from this, that it is a good challenge to the juror that he hath been a juror before in the same cause. But we must not make ourselves absolute judges of law and fact too; and there never was a new trial after a trial at bar, in ejectment," etc. And Lord Mansfield, in the valuable case of *Bright v. Eynon* 1 Burrow, 390 (1757), said: "It is not true 'that no new trials were granted before 1655;' as has been said from Style, 466." He was referring, apparently, to the argument of Serjeant Maynard,

---

<sup>1</sup> "It remained," says Mr. Pike (*Hist. Crime*, ii. 368-9), "for Lord Ellenborough, in the year 1816, to lay clearly down the maxim that a judge who should tell jurors to consider as evidence their own acquaintance with matters in dispute would misdirect them. The true qualification for a juror has thus become exactly the reverse of that which it was when juries were first instituted. In order to give an impartial verdict, he should enter the box altogether unformed on the issue which he will have to decide." Perhaps the effect of this case, which I take to be *R. v. Sutton*, 4 M. & S. 532, is overstated here. But this, at least, is true, that the Court here *assumes* the truth of this doctrine. See 3 *Har. Law Rev.* 300; *McKinnon v. Bliss*, 21 N. Y. p. 215.

in that case (*Wood v. Gunston*), who "said that after a verdict the partiality of the jury ought not to be questioned, nor is there any precedent for it in our books of the law." Lord Mansfield added (p. 394): "The reason why this matter cannot be traced farther back is, 'that the old Report Books do not give any accounts of determinations made by the court upon motions.'"<sup>1</sup> In support of what he says, Lord Mansfield relies on the language of Glynne, C.J., in *Wood v. Gunston*: "It is frequent in our Books for the Court to take notice of miscarriages of juries and to grant new trials upon them." But it seems true that the change came about not long before *Wood v. Gunston*. In 1648 in *Slade's Case* (Style, 138), judgment had been stayed upon a verdict, on a certificate from the judge presiding at the trial, who certified that "the verdict passed against his opinion." A motion was now made for judgment; but "Hales of counsel with the defendant prayed that this judgment might be arrested, and that there might be a new trial, for that it hath been done heretofore in like cases."<sup>2</sup> Roll, J., "It ought not to be stayed, though it have been done in the Common Pleas, for it was too arbitrary for them to do it, and you may have your attain against the jury, and there is no other remedy in law for you, but it were good to advise the party to suffer a new trial for better satisfaction." We may take it, then that in the early part of the seventeenth century the practice of supervising the verdicts of juries, much as it is now done, was introduced, or, at any rate, clearly recognized and established.<sup>3</sup>

Now, as I have said, in order to enforce effectually the granting of new trials, it was important that the jury should disclose publicly what they knew, so that the Court could tell whether they really did go against evidence or not. The Courts acted accordingly. In 1650, in *Bennett v. Hartford* (Style, 233), it was laid down that a juror ought to state publicly in court on oath any information that he has, and not to give it in private to his companions. In 1656,<sup>4</sup> a barrister being returned of the jury, and "having been

<sup>1</sup> Hales is probably Sir M. Hale, who was so called, and was then a leading barrister.

<sup>2</sup> A very interesting fact should be noted here, that the Common Law Courts were not only stirred up to granting new trials by the obsolescence of attainments, and the need of controlling juries, but by the interference of Courts of Equity. In *Martyn v. Jackson* (1674), on the motion to set aside a verdict on the parol affirmation of Hale, C.J., that it was against evidence, Twisden, J., and Wilde, J., refused a new trial. Rainsford, C.J., was for it: "Juries are wilful enough, and denying a new trial here will but send parties into the Chancery."

<sup>3</sup> *Duke v. Ventris*, a trial at bar, *Trials per Pais*, c. 12 (8th ed. p. 258).



at a trial of the same cause about twenty years past, in the exchequer, and heard there great evidence," asked whether he ought to inform the rest of the jury privately of this, or conceal it, or declare it in open court. The Court ordered him to make public declaration of it. He did so, and upon merely his jurymen's oath. Half a century later, in 1702,<sup>1</sup> the same duty is reported as having been laid down in general terms for the whole jury: "If a jury give a verdict on their own knowledge, they ought to tell the Court so, that they may be sworn as witnesses. And the fair way is to tell the Court before they are sworn that they have evidence to give."

We have now traced the old attainder to its end, and have brought out its modern substitute. During the last two or three centuries many interesting things grew out of the changes in the jury. The statutes of the sixteenth and seventeenth centuries, requiring two accusers and two witnesses in certain cases, were a limitation upon the power of the jury; before, they need have no witnesses at all. The process of laying down rules of presumption and fixing upon evidence a conclusive quality,—always an incident of judicature,—was yet immensely stimulated by the jury. A legislative illustration of this is seen in the "Statute of Stabbing" (1 Jac. 1, c. 8), in 1603, fixing upon certain acts the quality of malice aforethought, "although it cannot be proved;" a law made, as the judges declared in 1666, in *Lord Morley's Case* (Kelyng, 55), "to prevent the inconveniences of juries, who were apt to believe that to be a provocation to extenuate a murder which in law is not." There is reason to surmise that a leading motive in the enactment of that singular and very un-English piece of legislation, the Statute of Frauds, was found in the uncertainty that hung over everything at a period when the law of proof was so unsettled. It will be remembered that it was then a very critical time; that the attainder as an operative thing had vanished, while the law of new trials was in its tender infancy, and the rules of our present law of evidence but little developed.<sup>2</sup>

But the greatest and most characteristic offshoot of the jury was that body of excluding rules which chiefly constitutes the English "Law of Evidence." If we imagine what would have

<sup>1</sup> *Powys v. Guld*, 7 Mod. 1, s. c. anonymous, Salk. 405, Holt, 404.

<sup>2</sup> See *Harv. Law Rev.* iv. 91.

happened if the petit jury had kept up the older methods of procedure, as the grand jury in criminal cases did, and does at the present day,<sup>1</sup>— if, instead of hearing witnesses publicly, under the eye of the judge, it had heard them privately and without any judicial supervision, it is easy to see that our law of evidence never would have grown up. This it is,—this judicial oversight and control of the process of introducing evidence to the jury, that gave it birth; and he who would understand it must keep this fact constantly in mind.

*James B. Thayer.*

CAMBRIDGE.

---

<sup>1</sup> Two centuries ago the grand jury came near losing its ancient procedure. In *Shaftesbury's Case*, 8 How., St. Tr. 759 (1681), they were in fact compelled to receive their evidence publicly in court. But the vigorous protests of the jury and the fruitless outcome of the attempt led to an abandonment of it.

## THE FAILURE OF THE "TILDEN TRUST."

MELANCHOLY the spectacle must always be, when covetous relatives seek to convert to their own use the fortune which a testator has plainly devoted to a great public benefaction. But society is powerless, in a given case, so long as the forms of law are observed. When, however, charitable bequests have been repeatedly defeated, under cover of law, and that, too, although the beneficent purpose of the testator was unmistakably expressed in a will executed with all due formalities, and although the designated trustees were ready and anxious to perform the trust reposed in them, one cannot help wondering if there is not something wrong in a system of law which permits this deplorable disappointment of the testator's will and the consequent loss to the community. The prominence of the testator, and the magnitude of the "Tilden Trust," which has recently miscarried, have aroused so general an interest that this seems a peculiarly fit time to consider the legal reasons for the failure of that and similar charitable bequests in New York.

Governor Tilden's will is summarized by the majority of the court in *Tilden v. Green*,<sup>1</sup> as follows: "I request you [the executors] to cause to be incorporated an institution to be called the 'Tilden Trust,' with capacity to maintain a free library and reading-room in the city of New York, and such other educational and scientific objects as you shall designate; and if you deem it expedient—that is, if you think it advisable and the fit and proper thing to do—convey to that institution all or such part of my residuary estate as you choose; and if you do not think that course advisable, then apply it to such charitable, educational, and scientific purposes as, in your judgment, will most substantially benefit mankind."<sup>2</sup> The trustees procured the incor-

<sup>1</sup> 28 N. E. R. 880, 887.

<sup>2</sup> The writer is by no means convinced that this was a just interpretation of the will, but for the purposes of this article its accuracy is assumed.

poration of the "Tilden Trust," and elected to convey the entire residue to that institution. An admirable will and willing trustees — and yet the bequest was not sustained. If the trustees had not elected to give the property to the "Tilden Trust," that institution would have had no claim, nor would there have been, under the law of New York, any means of compelling them to apply it to the alternative charitable purposes. Therefore, the Court of Appeals decided, the trustees could not dispose of the property in either of the two modes indicated in the will, and the entire residue, amounting to some \$5,000,000, must be distributed among the heirs and next of kin.

The question of the proper interpretation of the will apart, the failure of the "Tilden Trust" is due to a combination of two causes: the one legislative, the other judicial. Had the Tilden case arisen in England, or in any of our States, except New York, Michigan,<sup>1</sup> Minnesota,<sup>2</sup> Maryland,<sup>3</sup> Virginia,<sup>4</sup> and West Virginia,<sup>5</sup> the trust would have been established. The precise nature of the legislation in New York will be best appreciated by contrasting a private trust with a charitable trust.

A trust, being an obligation of one person to deal with a specific *res* for the benefit of another, cannot be enforced unless there is a definite obligee, that is, a *cestui que trust*, who can file a bill for its specific performance. Furthermore, as equity follows the law, the rule of perpetuities must apply to trusts as well as to legal estates. By the English and general American law, neither of these doctrines, which are of universal application to private trusts, is extended to charitable trusts. On the one hand, the considerations of public policy, which lie at the foundation of the rule of perpetuities in the case of private property, are obviously inapplicable to property devoted to charity; and, on the other, the specific performance of the charitable trust is abundantly secured through the attorney-general acting in behalf of the State.

In New York, however, the English law of charitable trusts has been abolished by statute, and charitable trusts are thereby put

---

<sup>1</sup> *Methodist Church v. Clark*, 41 Mich. 730.

<sup>2</sup> *Little v. Willford*, 31 Minn. 173.

<sup>3</sup> *Gambel v. Trippe* (Md. 1892) 23 Atl. R. 461.

<sup>4</sup> *Stonestreet v. Doyle*, 75 Va. 356.

<sup>5</sup> *Bible Society v. Pendleton*, 7 W. Va. 79.

upon the same footing as private trusts, with the single exception that property may be given directly to corporations authorized to receive and hold permanently bequests for specified charitable purposes. This exceptional New York legislation seems to the writer an unmixed evil. Any one, who follows the reported cases, to say nothing of the unreported instances, for the last fifty years, will be startled at the number of testators whose reasonable wishes have been needlessly disappointed, and at the amount of property which has been diverted from the community at large for the benefit of unscrupulous relatives.<sup>1</sup>

Nor has New York, whose legislation in general has been widely copied, made any recent converts to her doctrine of charities. On the contrary, Wisconsin, which at one time followed the New York rule, by the revision of 1878 adopted the English practice with the exception of the so-called *cy-près* doctrine. Virginia, too, which at one time ignored the distinction between private and charitable trusts, has, by statute, sanctioned to a limited extent indefinite charitable trusts.

But even under the New York statutes, Governor Tilden's charitable purposes, it would seem, might have been accomplished within the rules applicable to private trusts. The objection of remoteness did not exist, for the will was carefully framed so as not to violate the rule of perpetuities; and the objection that there was no definite *cestui que trust* who could compel its performance was obviated by the willingness of the trustees to exercise their option in favor of the "Tilden Trust." Unfortunately, however, the New York courts had adopted a chancery doctrine, which was first stated in *Morice v. Bishop of Durham*.<sup>2</sup> In that case property was bequeathed to the bishop upon trust to dispose of the same to such objects of benevolence and liberality as he should most approve of. This was obviously not a charitable trust, and, there being no *cestui que trust*, there was no one who could compel its performance. The bishop, however, disclaimed any beneficial interest in himself and was ready,

---

<sup>1</sup> *Owens v. Missionary Society*, 14 N. Y. 380; *Downing v. Marshall*, 23 N. Y. 366; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 N. Y., 584; *Adams v. Perry*, 43 N. Y. 487; *White v. Howard*, 46 N. Y. 144; *Holmes v. Mead*, 52 N. Y. 332; *Prichard v. Thompson*, 95 N. Y. 76; *Cottmar v. Grace*, 112 N. Y. 299; *Read v. Williams*, 125 N. Y. 560; *Fosdick v. Hempstead*, 125 N. Y. 581; *Tilden v. Green*, 28 N. E. R. 880.

<sup>2</sup> 9 Ves. 399, 10 Ves. 521.

like the trustees in the "Tilden Trust," to apply the property in accordance with the testator's will. But the Master of the Rolls and the Lord Chancellor decided that the trust must fail, and decreed in favor of the next of kin.

One who dissents from a decision of Sir William Grant, affirmed by Lord Eldon, which has remained unchallenged for nearly ninety years, and which has been followed in many later decisions,<sup>1</sup> must realize that he is leading a forlorn hope. Nevertheless the writer, finding himself unable to agree with the conclusion in *Morice v. Bishop of Durham*, ventures to give the reasons for his faith.

It will be granted at the outset that the decision in this case defeated the will of the testator, and that nothing short of an imperative rule of law can ever justify such a result. It is also certain that no such rule of law is mentioned by Lord Eldon. The distinguished chancellor, after saying that the bishop could not hold for his own benefit, disposes of the bishop's willingness to perform the trust in this short and unsatisfactory fashion: "I do not advert to what appears upon the record of his intention to the contrary, and his disposition to make the application; for I must look only to the will, without any bias from the nature of the disposition, or the temper and quality of the person who is to execute the trust." Sir William Grant seems to have thought that the right of the next of kin resulted from an intestacy as to the beneficial interest.<sup>2</sup> But the fallacy of this view is demonstrable with almost mathematical conclusiveness. An intestacy, where everything that the testator had passes by his will, is a self-evident contradiction. And yet in *Morice v. Bishop of Durham* all the testator's property did pass by his will to the bishop. If it be said that the legal title passed, but not the equitable interest, the answer is that the absolute owner of property has no equitable

---

<sup>1</sup> *James v. Allen*, 3 Mer. 17 (*semble*); *Ommaney v. Butcher*, T. & R. 260; *Fowler v. Garlike*, 1 Russ & M. 232; *Williams v. Kershaw*, 5 Cl. & F. 111 (*semble*); *Harris v. Du Pasquier*, 26 L. T. Rep. 689; *Leavers v. Clayton*, 8 Ch. D. 589; *Adye v. Smith*, 44 Conn. 60; *Chamberlain v. Stearns*, 111 Mass. 267; *Nichols v. Allen*, 130 Mass. 211. But see *Goodale v. Mooney*, 60 N. H. 528.

<sup>2</sup> "If there be a clear trust, but for uncertain objects, the property that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner." 9 Ves. 399. See, to same effect, *Levy v. Levy*, 33 N. Y. 97, 102 per Wright, J., and *Holland v. Alcock*, 108 N. Y. 312, 323 per Rapallo, J.

interest. The use of the words "equitable ownership" and "equitable estate" is so inveterate among lawyers that we do not always remember that these are figurative rather than exact legal terms. An equitable interest is a right *in personam*. It implies, of necessity, a relation between two persons, known as the trustee and the *cestui qui trust*. In the case of absolute ownership who is the trustee? An equitable claim by the owner against himself as the holder of the legal title would be an absurdity. Test the matter in another way. Transfer by intestacy is a true succession. The right of the successor is of precisely the same nature as that of his predecessor. The right of the next of kin, as established by Lord Eldon, was a genuine equitable interest. The next of kin were *cestuis que trustent*, the bishop was trustee. In other words, the next of kin had a claim against the person of the bishop. But the testator never had any right against the bishop. How, then, any intestacy?

Lord Eldon and Sir William Grant, futhermore, relied greatly upon the case of *Brown v. Yeall*,<sup>1</sup> where the trust was void as a perpetuity, and their reliance upon this case warrants the belief that the case before them was assimilated, somewhat inconsiderately, to a distinct class of cases, where decrees in favor of the testator's heir or next of kin are eminently just. And this leads us to a consideration of the true principle by which courts of equity dispose of the beneficial interest in property where an intended trust necessarily fails.

If property is conveyed upon trust, and, by some oversight, no beneficiary is designated, or if the beneficiary named is non-existent, or incapable of identification by the trustee, or refuses the gift, or if the trust is for an illegal purpose, the trust must, in the nature of things, fail.

The *res*, which is the subject-matter of the trust, vests, nevertheless, in the trustee. The courts might, conceivably, as Lord Eldon suggested in *Morice v. Bishop of Durham*, have allowed the trustee to hold the *res* for his own benefit, discharged of any trust. In fact, however, they have compelled him to hold the property as a trustee for the creator of the express trust, if he is still living, or for his representative, if he is dead. This equitable right, as we

---

<sup>1</sup> 7 Ves. 50 n.

have seen, does not come to the heir or next of kin as an intestate succession. The trust comes into being only after the death of the testator. Being the creation of the courts of equity it is a constructive or *quasi* trust, and founded, like all constructive trusts, upon natural justice. The trustee was plainly not intended to take the property for himself; he ought to hold it for some one; and no one, it is obvious, is, in general, so well entitled to the beneficial interest as the creator of the trust or his representative.<sup>1</sup>

If, however, as in *Morice v. Bishop of Durham*, and the "Tilden Trust," the performance of the express trust is not impossible nor illegal, even though there is no specific *cestui que trust* named who can compel its performance, the trust does not of necessity fail. Whether it shall fail or not in a given case must depend on the will of the trustee. If the trustee refuses to perform, as there is no one to compel performance, the trust fails, and the trustee, as in the other cases of impossibility and for the same reasons, will be held as a constructive trustee for the creator of the trust or his representative. If, however, the trustee is willing to perform the trust, these reasons lose all their force.

---

<sup>1</sup> Sometimes natural justice dictates a different disposition of the beneficial interest; e.g., property is devised upon trust to distribute the same among members of a class, with full discretion as to the proportions and the individuals within the class. The trustee for some reason fails to distribute. The express trust, then, cannot be performed. The trustee, however, as before, ought not to keep the property for himself. But here it is much more consonant with natural justice to create a constructive trust for the equal benefit of all the members of the class than to give it to the testator's representative. Where the class is defined as "relatives," the trustee may, of course, select any relatives, however distant. But, if he makes no selection, an equal distribution among all kinsmen, near and remote, would commonly be impracticable. Equity, therefore, goes a step further and limits the equal distribution to those who would be entitled under the statute of distributions. This solution is doubtless in accordance with the general sense of justice. *Huling v. Fenner*, 9 R. I. 412. The common explanation of these cases, that there is a gift which vests in the class subject to be divested by the exercise of the trustee's discretion in favor of some one or more of the class, seems to be artificial and unsupported by the facts.

Again, if property is bequeathed to a trustee for such charitable purposes as he shall designate, and the trustee names none, the express trust cannot be carried out. Equity, however, will treat this as a constructive trust for general charity and frame a scheme. And this disposition of the property, as every one will admit, is a nearer approximation to the testator's probable intention, and therefore more just than to create a constructive trust for his representative. *Minot v. Baker*, 147 Mass. 348, and cases cited.



In the one case, where the will of the testator *cannot* be carried out, equity, by interfering, prevents the unjust enrichment of the trustee at the expense of others better entitled.

In the other case, where the will of the testator *can* be fulfilled, equity, by interfering, defeats his will and thus produces the unjust enrichment of the testator's representative at the expense of the intended beneficiary.

In the one case, the impossibility of performing the express trust gives rise to an equitable constructive trust. In the other case, an inequitable constructive trust is what causes the impossibility of performing the express trust. Surely a strange perversion.

It may be said that there can be no trust without a definite *cestui que trust*. This must be admitted. If, for instance, property is given to A upon trust to convey to such person as he shall think deserving, and A either refuses to convey to any one, or conveys to B as a deserving person, there is, properly speaking, no express trust here. In the one alternative the express trust fails; in the other alternative B gets the legal estate. But it does not follow from this admission that such a gift is void. Even though there be no express trust, there is a plain duty imposed upon A to act, and his act runs counter to no principle of public policy. Why then seek to nullify his act? The only objection that has ever been urged against such a gift is that the court cannot compel A to act if he is unwilling. Is it not a monstrous *non sequitur* to say that therefore the court will not permit him to act when he is willing?

It may be objected that a devise might in this way become "the mere equivalent of a general power of attorney;" but this objection seems purely rhetorical. Suppose a testator to give A a purely optional power of appointment in favor of any person in the world except himself, with a provision that in default of the exercise of the power the property shall go to the testator's representatives,—or this provision may be omitted altogether, the effect being the same. Such a will is obviously nothing if not the mere equivalent of a general power of attorney. And yet the validity of this power would be unquestioned. If the power is exercised, the appointee takes. If it is not exercised, the testator's representative takes.

Now vary the case by supposing that the testator imposes upon the donee of the power the *duty* to exercise it. Can the imposition of this duty furnish any reason for a different result? In fact, A, the donee of the power, has in this case also the option of appointing or not, since, although he ought to appoint, no one can compel him to do so. Does it not seem a mockery of legal reasoning to say that the court will sanction the exercise of the power where the donee was under no moral obligation to act at all, but will not sanction the appointment when the donee was in honor bound to make it?

It is time enough for the court to interfere when A proves false to his duty and sets up for himself. Then, indeed, a court of equity ought to turn him into a constructive trustee for the donor or his representative. This contingent right of the heir or next of kin may be safely trusted to secure the performance of his duty by the trustee. And its existence is a full answer to the suggestion of Sir William Grant in *Morice v. Bishop of Durham* and of Mr. Justice Rapallo in *Holland v. Alcock*,<sup>1</sup> that the trustee could keep the property without accountability to any one, if the beneficial interest were not given unconditionally to the heir or next of kin immediately upon the testator's death. The position of the heir or next of kin is, in substance, the same as in cases where property is given to them subject to a purely optional power of appointment in another to be exercised, if at all, within a reasonable time. Sir William Grant himself said, in *Gibbs v. Rumsey*,<sup>2</sup> which was such a case: "The claim of the heir or next of kin is premature until it shall be seen whether any appointment will be made."

We may appeal from Mr. Justice Rapallo in *Holland v. Alcock* to the opinion of the same distinguished judge in *Gilman v. McArdle*.<sup>3</sup> In each of these cases there was a trust for the same indefinite object, namely, the celebration of masses for the soul of the creator of the trust. In the former case the trust was expressed in a will, in the other case the trust was annexed to a conveyance *inter vivos*. In neither case was there any mode of compelling the specific performance of the trust. And yet the court would not allow the trustee under the will to perform the trust, but compelled him to surrender the trust property to

---

<sup>1</sup> 108 N. Y. 323.

<sup>2</sup> 2 V. & B. 299.

<sup>3</sup> 99 N. Y. 451.

the testator's representative ; whereas the same court refused to prevent the trustee under the conveyance *inter vivos* from performing the trust, and decided that the right of the grantor's representative to the trust property was contingent upon the refusal of the trustee to perform the trust. The distinction was said to result from the fact that there was a contract in *Gilman v. McArdle*. But what difference could the contract make beyond giving a right to sue at law for damages upon its breach ? The duty to perform the trust was as cogent upon the trustee under the will as upon the trustee under the conveyance. In each case, and for the same reasons, the breach of that duty would give rise to an equitable obligation against the trustee to surrender the property which had been given to him upon confidence that he would perform the trust. And in neither case is there any assignable reason for creating this equitable obligation before any default in the trustee.

Although *Morice v. Bishop of Durham* has never been directly impeached, either in England or this country, there are several groups of cases, undistinguishable from it in principle, in which the equity judges have declined to interfere, at the suit of the next of kin, to prevent the performance of a purely honorary trust.

*Mussett v. Bingle*<sup>1</sup> is one illustration. The testator bequeathed £300 upon trust for the erection of a monument to his wife's first husband. It was objected that the trust was purely honorary ; that is, that there was no beneficiary to compel its performance. But the trustee being willing to perform, Hall, V.C., sustained the bequest. In the similiar case of *Trimmer v. Danby*,<sup>2</sup> *Kindersley, V.C.*, said : " I do not suppose that there would be any one who could compel the executors to carry out this bequest and raise the monument ; but if . . . the trustees [*i.e.*, the executors] insist upon the trust being executed, my opinion is that this court is bound to see it carried out." There are many American decisions to the same effect.<sup>3</sup>

---

<sup>1</sup> W. N. [1876] 170.

<sup>2</sup> 25 L. J. Ch. 424. See, further, *Masters v. Masters*, 1 P. Wms. 423; *Mellick v. Asylum*, Jacob, 180; *Limbrey v. Gurr*, 6 Mad. 151; *Adnam v. Cole*, 6 Beav. 353.

<sup>3</sup> *Gilmer v. Gilmer*, 42 Ala. 9; *Johnson v. Holifield*, 79 Ala. 423, 424; *Cleland v. Waters*, 19 Ga. 35, 54, 61; *Detwiller v. Hartman*, 37 N. J. Eq. 347 (a \$40,000 monu-

*Gott v. Nairne*<sup>1</sup> is another case at variance with *Morice v. Bishop of Durham*. In that case £12,000 were bequeathed to trustees, on trust at their discretion to buy an advowson and nominate to it such person as they should think proper. Subject to this trust, the advowson was to be held in trust for A until he should have a benefice worth £1,000 a year, or died. Until the advowson was bought the fund was to accumulate, and at the end of twenty-one years, or at A's death, or on his being presented to a benefice worth £1,000 a year, the fund was to belong to A, his executors and administrators, absolutely. The fund accumulated for twelve years. No advowson had been purchased, but the trustees did not desire to renounce the trust. Under the English rule, which gives a *cestui que trust*, who has the entire beneficial interest in property, the right to have a conveyance of the legal title, A claimed to have the fund transferred to him. The bill was dismissed on the ground that A had not the exclusive interest; for the trustees, though not compellable, were yet at liberty to nominate some person other than A. Hall, V.C., after remarking that the trustees disclaimed any beneficial interest and desired to perform the trust, added: "I see no reason why the trustees should not be allowed to carry out this trust."

A bequest for the celebration of masses for the soul of a deceased person is, in Ireland,<sup>2</sup> an honorary trust. No one can file a bill to compel its performance. But if the trustee is willing to comply with the testator's direction, the next of kin cannot interfere to prevent him.<sup>3</sup>

---

ment); *Wood v. Vandeburgh*, 6 Paige, 277; *Emans v. Hlickman*, 12 Hun, 425; *Re Frazer*, 92 N. Y. 239; *Hagenmeyer v. Hanselman*, 2 Dem. 87, 88 (but see *Re Fisher*, 8 N. Y. Sup. 10); *Bainbridge's App.*, 97 Pa. 482; *Fite v. Beasley*, 12 Lea, 328; *Cannon v. Apperson*, 14 Lea, 553, 590.

<sup>1</sup> 3 Ch. D. 278, 35 L. T. Rep. 209 s. c.

<sup>2</sup> In Massachusetts and Pennsylvania a bequest for masses is a good charitable trust. *Schouler's Pet.*, 134 Mass. 426; *Seibert's Ap.*, 18 W. N. (Pa.) 276. In England such a bequest is void, as a superstitious use. *West v. Shuttleworth*, 2 M. & K. 684; *Re Fleetwood*, 15 Ch. D. 596; *Elliott v. Elliott*, 35 Sol. J. 206.

<sup>3</sup> *Commissioners v. Wybrants*, 7 Ir. Eq. 34, n.; *Read v. Hodgins*, 7 Ir. Eq. 17; *Brennan v. Brennan*, Ir. R. 2 Eq. 321; *Dillon v. Rielly*, Ir. R. 10 Eq. 152; *Atty.-Gen. v. Delaney*, Ir. R. 10 C. L. 104; *Bradshaw v. Jackman*, 21 L. R. Ir. 12; *Reichenbach v. Quin*, 21 L. R. Ir. 138; *Perry v. Tuomey*, 21 L. R. Ir. 480. The Court of Appeals has consistently

The most conspicuous illustration of the doctrine which is here advocated is to be found in the recent English case of *Cooper-Dean v. Stevens*.<sup>1</sup> There was in this case a bequest of £750 for the maintenance of the testator's horses and dogs. It was urged by the residuary legatee, on the authority of *Morice v. Bishop of Durham*, that this trust must fail, although the trustees desired to perform it. But the trust was upheld. North, V.C., disposed of the plaintiff's argument as follows: "It is said that the provision made by the testator in favor of his horses and dogs is not valid; because (for this is the principal ground upon which it is put) neither a horse or dog could enforce the trust; and there is no person who could enforce it, . . . and that the court will not recognize a trust unless it is capable of being enforced by some one. I do not assent to that view. There is no doubt that a man may, if he pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church, or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid; although it is difficult to say who would be the *cestui que trust* of the monument. In the same way, I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion, such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities it would be illegal. But a trust to lay out a certain sum in building a monument . . . is, in my opinion, a perfectly good trust, although I do not see who could ask the court to enforce it. If persons beneficially interested in the estate could do so, then the present plaintiff can do so; but if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively

---

maintained the opposite view in *Holland v. Alcock*, 108 N. Y. 312; *O'Connor v. Gifford*, 117 N. Y. 275, 280. (But see *Hagenmeyer v. Hanselman*, 2 Dem. 87. Even in New York a gift *inter vivos* for the celebration of masses for the soul of the donor is valid. *Gilman v. McArdle*, 99 N. Y. 451.)

<sup>1</sup> 41 Ch. D. 552.

enforce it. Is there anything illegal or obnoxious to the law in the nature of the provision — that is, in the fact that it is not for human beings, but for horses and dogs?" The vice-chancellor answered this question in the negative, and added, "There is nothing, therefore, in my opinion, to make the provision for the testator's horses and dogs void."<sup>1</sup> The learned reader will observe the care with which the distinction is drawn between trusts for a legal purpose and trusts for illegal purposes — the precise distinction which Lord Eldon seems to have overlooked in *Morice v. Bishop of Durham*.

This distinction between an illegal trust and a valid, though merely honorary, trust is well brought out by some decisions in the Southern States before the war. A bequest upon trust to emancipate a slave in a slave State was void, it being against public policy to encourage the presence of free negroes in a slave-holding community. But a bequest upon trust to remove a slave into a free State and there emancipate him was not obnoxious to public policy, and although the slave could not compel the trustee to act in his behalf, still the courts acknowledged the right of a willing trustee to give the slave his freedom in a free State.<sup>2</sup> The reasoning of the courts is similar to that already quoted. Rice, C.J., for example, in *Hooper v. Hooper*<sup>3</sup> says: "The Court of Chancery will recognize the *authority* of the executor to execute the trust. . . . But the slave cannot enforce its execution by suit. . . . The trust is one of that class which may be valid, and yet not capable of being enforced against the trustee by judicial tribunals." So in *Cleland v. Waters*,<sup>4</sup> per Starnes, J.: "At all events, if the executors do send him out of the country, no one can gainsay him. . . . Where there is

<sup>1</sup> See to the same effect *Mitford v. Reynolds*, 16 Sim. 105; *Fable v. Brown*, 2 Hill, Ch. 378, 382; *Skrine v. Walker*, 3 Rich. Eq. 262, 269.

<sup>2</sup> *Hooper v. Hooper*, 32 Ala. 669; *Sibley v. Marian*, 2 Fla. 553; *Cleland v. Waters*, 19 Ga. 35; *Ross v. Vertner*, 6 Miss. 305; *Thompson v. Newlin*, 6 Ired. 380, 8 Ired. 32; *Frazier v. Frazier*, 2 Hill, Ch. (S. C.), 304; *Henry v. Hogan*, 4 Humph. 208; *Purvis v. Shannon*, 12 Tex. 140; *Armstrong v. Jowell*, 12 Tex. 58; *Elder v. Elder*, 4 Leigh, 252.

<sup>3</sup> 32 Ala. 669, 673.

<sup>4</sup> 19 Ga. 35, 61.

no municipal law forbidding it, the testator can certainly make such a law for himself in his will, and the same reason exists why the executor should carry it into effect as why he should erect a monument or tombstone if so directed by the testator's will. It will not be disputed . . . that it would be the duty of the executor to carry such direction into effect, and that he would be sustained by a court of justice in so doing. . . . Yet it could not be said that the tombstone had any right in the premises, or perhaps that any remedy lay against the executors, by which the erection of the stone could be enforced."

The true doctrine is nowhere better stated than by Buckner, C., in *Ross v. Duncan*:<sup>1</sup> "The ground was taken that, as the negroes for whose benefit the trust was raised can maintain no suit in our courts to enforce it, and there being no one who can enforce it, the trust is void. The conclusion does not necessarily follow from the premises. A trust may be created which may be perfectly consistent with the law, and yet the law may have pointed out no mode of enforcement; still it would not interfere to prevent it, but would leave its execution to the voluntary action of the trustee. A person may convey his property upon what trust or condition he pleases, so that it be not against law; and the court would only interfere at the instance of the heirs or distributees of the grantor or testator when there had been a failure or refusal to perform the condition or trust."

Whether, then, *Morice v. Bishop of Durham* be considered from the point of view of principle, or in the light of the subsequent adverse decisions, it seems clear that Lord Eldon's opinion ought not to be followed unless by courts irrevocably bound by their own precedents. Unfortunately the New York Court of Appeals was thus hampered when the Tilden case came before it. In *Holland v. Alcock*,<sup>2</sup> the point had been taken, but without success, that the trustee, though not compellable to perform an honorary trust, should not be prevented from doing so. We must believe that no one of the numerous authorities in support of this position was brought to the attention of the court in that

---

<sup>1</sup> *Freem Ch. (Miss.)* 587, 603.

<sup>2</sup> 108 N. Y. 312.

case, for Mr. Justice Rapallo made the surprising statement that the trustee's contention had never been sanctioned by any decision. *Holland v. Alcock* was followed in *O'Connor v. Gifford*<sup>1</sup> and *Reed v. Williams*.<sup>2</sup> Hence the subsequent failure of the "Tilden Trust."

*J. B. Ames.*

---

<sup>1</sup> 117 N. Y. 275.

<sup>2</sup> 125 N. Y. 560.



# HARVARD LAW REVIEW.

---

Published monthly, during the Academic Year, by Harvard Law Students.

---

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

---

## *Editorial Board.*

OLIVER PRESCOTT, JR., . . . . .	<i>Editor-in-Chief.</i>
PHILIP S. ABBOT, <i>Treasurer,</i>	RICHMOND O. AULICK,
ALBERT S. BARD,	ALBERT E. HADLOCK,
NORMAN HAPGOOD,	HENRY HUDSON,
CARLETON HUNNEMAN,	J. WRIGHT HUNT,
FREDERICK B. JACOBS,	M. DAY KIMBALL,
JAMES G. KING,	JAMES M. NEWELL,
PHILIP WARDNER,	CHARLES WARREN,
GEORGE E. WRIGHT.	

---

HARVARD LAW SCHOOL — THE DEAN'S ANNUAL REPORT. — In view of the great increase of students in the Law School, brief mention of which has already been made in the REVIEW,<sup>1</sup> the Annual Report<sup>2</sup> by Professor Langdell as dean is of more than its customary interest. In addition to the usual tables of statistics, there is inserted in the report a classification of the students according to the States and countries from which they have come, and also a classification of college graduates according to their colleges. The latter table is especially noteworthy, showing as it does that since 1870 one hundred and forty-two colleges other than Harvard have sent graduates to this school.

In consequence of the increase of students, as the report points out, serious mechanical difficulties present themselves in the management of the school. Austin Hall, built only eight years ago, and expected to furnish ample accommodation to the school for fifty years, is already outgrown. The library, well known to be one of the largest and most complete law-libraries in the country, is not only taxed to its utmost capacity, but is really suffering material injury from the consumption of valuable books due to the incessant use of them by the numerous students. It is evident that nothing short of an additional building and an additional library will make it practicable for the school to furnish suitable accommodation for any larger number of students than it now has. The resources of the school, however, are not such as to allow, at present, of such an enlargement. The only effective mode which presents itself, then, of guarding against the state of things which seems imminent is to limit the number of students to be received. With this object in view, two measures have been adopted by the faculty which will probably tend to that result. A regulation has been made that no student, whether a candidate for a degree or a special student, who fails to pass an examination in at least three subjects either at the regular examinations held at the end of his first year in the school or at the examinations held in the following September, will be allowed, unless by a vote of the faculty, to

---

<sup>1</sup> 5 Harv. Law Rev., 238.

<sup>2</sup> Annual Reports of the President and Treasurer of Harvard College, 1890-1891.

continue in the school. Then, too, it has already been decided to admit to the school after next year only graduates of colleges and such non-graduates as pass the examination for admission; and the requirements of the latter are to be materially increased. This measure, however, it will be noticed, does not go into operation for a year, so that its immediate effect will probably be to increase rather than diminish the number of students coming to the school. With reference to the coming year, therefore, some further plan needs to be worked out, and that without delay.

ANIMALS FERÆ NATURÆ — NO RIGHTS GAINED BY TRESPASSER. — While the rights to animals *feræ naturæ* as between the owner of the soil and others have been fairly settled by a considerable series of cases, the relative rights of parties both of whom acknowledge the superior right of the owner of the soil seem never to have been precisely described. In a recent Rhode Island case<sup>1</sup> the plaintiff, without permission, placed a hive upon the land of a third person. The defendant, also a trespasser, removed the bees and honey which had collected in the hive. The court find no cause of action, holding that neither title nor right to possession is shown either to the bees or to the honey. The discussion, especially in a case where the precise point is clearly new, is unfortunately general and largely irrelevant. Most of it is given up to showing, on the basis of *Blades v. Higgs*,<sup>2</sup> that the right of the owner of the soil, uncertain as it is, cannot be terminated by the act of a trespasser, as no title to such animals can be gained except by a legal act. While this is undoubted law, it scarcely need follow that a trespasser cannot maintain, on the basis of mere possession, an action against a later trespasser. There may have been a possible doubt as to the plaintiff's having reduced the animals to possession by collecting them in his hive, but in the preceding cases that would seem to give him actual physical possession, enough for this action. About the honey there would seem to be even less doubt; but, strange to say, neither in this case nor elsewhere does the question seem to have been discussed, how far the law about animals *feræ naturæ* applies to their produce, as eggs or honey. The reason on which the law about the animals is founded is wholly inapplicable to the honey, but this case tacitly assumes that no distinction is to be drawn.

The judge gaily cites all the cases he can find on the subject, but the only one near enough to draw an analogy from seems to favor the defendant's contention. There both parties were on the land without permission, though with the knowledge of the owner, who made no objection. The defendant interfered after the plaintiff had begun to cut the tree, and the plaintiff recovered in trespass. A dictum is in point: ". . . these parties stood, as between themselves, and as respects the legal principles applicable to the case, in precisely the same position as though neither had any authority from the owner of the tree, and both were trespassers upon his rights." The law of the bee-trade thus seems, slight as it is, to be in a state even more unsatisfactory than the general law as to the relative rights of trespassers.<sup>3</sup>

<sup>1</sup> *Rexworth v. Com.*, 23 Atl. Rep. 37.

<sup>2</sup> 11 H. L. Cas. 621.

<sup>3</sup> *Adams v. Burton*, 31 Vermont, 36.

**RIGHT OF A FORMER WARD OF COURT TO MARRY.** — The recent volume of Chancery Division reports gives us the encouraging decision of *Bolton v. Bolton*,<sup>1</sup> gratifying to all sympathetic jurists. A young lady whose property enjoyed the protection of the Court engaged herself, at the age of nineteen, to a commercial traveller in a good position, with a salary of £300 per annum; the contract being founded, however, in the gentleman's affidavit that, if the Honorable Court would permit him to visit and pay his addresses, he would so act as became a gentleman and an honorable man, and in all respects abide the directions and orders of the Honorable Court.

As Miss Bolton was anxious to start her proposed husband in business at once, she arranged to become his wife six days after becoming of age, contrary to the warning of her father, whose advice was rewarded by unsatisfactory replies from both of the lovers. The father accordingly procured an order restraining the parties from intermarrying, from which order Miss Bolton and Mr. Russell appeal.

In discharging the injunction, the Court say, that although it at first occurred to them that the power of preventing a marriage not on terms of their choosing was given to them by Mr. Russell's affidavit, they have been forced to yield to the argument that that promise must be fairly interpreted as coextensive with the Court's jurisdiction. After this generous admission the Court made the luminous suggestion that it is impossible for them to restrain the gentleman from marrying without restraining the lady, which they have no jurisdiction to do. So both are free.

**ENGLISH JUDGES OF TO-DAY.** — The following few details concerning the present English judges may be of interest to those who are obliged to read their decisions.

The head of the English judicial system, the Lord Chancellor, is Lord Halsbury. As Sir Hardinge Giffard he was a noted advocate in *nisi prius* and criminal cases. Later he became a politician and orator, was Solicitor General under Disraeli, and in 1885 obtained the woolsack as a political reward, the salary being £10,000. He is known among scholars as a noted Hebrew scholar.

Of the three Lords of Appeal in Ordinary, with salaries of £6,000, Lord Watson, formerly Lord Advocate under Beaconsfield, represents the Scotch law. He is considered one of the soundest and most brilliant of the judges, with a complete mastery of the law. Lord Hannen was counsel in the great Shrewsbury case before the House of Lords, and late President of the Divorce Court; he also presided over the Parnell Commission.

Of the judges in the House of Lords who usually sit, Lord Bramwell is the best known as well as the oldest, having been born in 1808. He was made Baron of the Exchequer in 1856; he is a liberal in politics, and actively interested in political economy. His opinions are generally forcible and full of common sense. A writer in the "Law Quarterly" speaks of his style as "slashing sword-thrusts." Lord Herschell was Lord Chancellor under Gladstone. He is a well-known philanthropist, and interested in education. Lord Field earned his reputation as a puisne judge in Queen's Bench, to which he was appointed in 1875. Other well-known judicial peers are Earl Sel-

<sup>1</sup> 1891, 3 Ch. Div. 270.

borne, formerly Sir Roundell Palmer, who was one of the counsel in the Geneva Arbitration in 1871, and author of the Judicature Act of 1873, and Sir William Grove.

Of the Court of Appeal the head, *ex officio*, is Lord Chief Justice Coleridge, with a salary of £8,000. He very seldom sits in this court, but generally in his own court at jury trial, or as senior of a divisional court of the Queen's Bench Division. He was Solicitor General under Gladstone in 1868, and later Attorney General. In 1873 he was offered the position of Master of the Rolls, but refused it, Sir George Jessel obtaining it. He then became Chief Justice of Common Pleas, and in 1880 Lord Chief Justice. He administers the law with great boldness and freedom, and between him and Lord Esher there is great rivalry. In the absence of Coleridge, Lord Esher presides over the Court of Appeals, with a salary of £6,000. He was formerly Mr. Justice Brett, and is a conservative in politics; he has little patience for theory and innovation, but is opposed to fine distinctions, basing his decisions on common sense; he was a great oarsman in college, and has a large knowledge of nautical and mercantile affairs. He was made Lord Esher in 1880, and Master of the Rolls in 1883.

Of the judges of Court of Appeal, with a salary of £5,000, Lindley, L.J., is author of Lindley on Partnership. Bowen, L.J., is a typical scholar, well known as a translator of Virgil. Lopes, L.J., who was a member of Parliament until 1876, is a solid judge without a brilliant reputation, and has served his fifteen years, after which time a judge becomes entitled to a pension. Kay, L.J., is the latest judge appointed, having had a great reputation as a puisne Chancery Justice.

Of the fourteen judges of the Queen's Bench Division of the High Court of Justice, with a salary of £5,000, Mr. Justice Hawkins is of most varied talents, with a shining reputation for political oratory, a lover of sport, and with a keen sense of humor. He is always expected to act with some disregard of ordinary rules. He was formerly counsel in the famous Tichborne case. Mr. Justice Denman, who succeeded Mr. Justice Willes, was member of Parliament from 1859 to 1872. Baron Pollock, who is a son of the Lord Chief Baron of the Exchequer, succeeded Baron Channell in 1873. He, Lord Esher, and Lord Coleridge are the only ones of the present judges who sat in the old courts of Westminster.

Of the five Chancery judges, Mr. Justice Romer and Mr. Justice Stirling were distinguished scholars and senior wranglers. Mr. Justice Chitty, is well known as an athlete, and has for some years been judge of the university boat-races.

#### LECTURE NOTES.

[These notes were taken by students from lectures delivered as part of the regular course of instruction in the School. They present, therefore, no carefully formulated statements of doctrine, but only such informal expressions of opinion as are usually put forward in the class-room. For the form of these notes the lecturers are not responsible.]

PROOF IN BANKRUPTCY ON JOINT OBLIGATIONS (*From Professor Ames' Lectures*). — Suppose that A and B are jointly liable to C on a bond for \$10,000.

1. Where both A and B are insolvent, what are the rights of C as to proof in bankruptcy?

It is settled law that if C has received no dividends from either estate, he may prove for the full amount against each, receiving in dividends

only enough to give him full payment. After proof is made, a dividend from one estate will not reduce the proof against the other. If, however, a dividend is received from A's estate before proof is filed against B's, the latter proof must be diminished by the amount of the dividend already received. Thus, if A's estate has paid fifty per cent. the subsequent proof against B's estate must be for \$5,000 only; and if B's estate pays fifty per cent. C will receive only seventy-five per cent. in all.

The results reached by the established rule are certainly unsatisfactory. Obviously each estate ought in justice to bear an equal burden. But as the law stands, if A becomes bankrupt first, proof for the full amount can be made against his estate; while subsequent proof against B's estate must be diminished by the amount received from A's. If each estate pays fifty per cent., A will be obliged to pay \$5,000, and B only \$2,500. The same result will be reached if the creditor inadvertently or through ignorance delays his second proof until after a dividend has been declared upon the first. A rule which thus distributes the burden unequally and hap-hazard according to mere chance has little to commend it as a practical working-rule. Nor is it necessary upon sound principles. To an action at common law on an obligation under seal, payment was no defence. If the obligor upon payment was not diligent enough to take a discharge under seal, or to have the instrument delivered up to be destroyed, he was liable to another action at law on the obligation. His only remedy was a bill in equity. The foundation of this bill was the injustice of allowing the creditor to receive payment twice. Now, upon a joint bond each obligor is liable, and a judgment at law may be recovered against each for the full amount. If one of the co-obligors, for example A in the case stated, had paid half the debt, he would still be liable at law for the whole amount, and B would also be liable for the whole amount. And, as the creditor has received but half the amount due him, neither A nor B would have any equitable defence except as to half the debt. And if B is insolvent and only able to pay fifty per cent., there can be no equitable bar whatever to the creditor's legal claim against him for the full amount; because, upon the hypothesis, the creditor will not receive more than the amount actually due. It would seem to follow that if both the obligors are insolvent, being both liable at law for the full amount, full proof should be allowed against each estate, the fact of a dividend received from one declared before proof against the other being no answer to the second proof in full, unless it can be shown that the dividend from the second estate will give the creditor more than he is equitably entitled to receive. If the first estate pays more than its proper share, that is, more than half the debt, anything received from the second estate in excess of full payment should be allowed to be received in trust to be paid over to the first estate. Thus if A's estate pays seventy-five per cent., \$7,500, and B's estate subsequently yields fifty per cent., \$5,000, the surplus, \$2,500 must be handed over by the creditor to A's estate. Perfect equality is thus secured. This rule is based upon the theory that a creditor can prove for what is legally due him. The only other sound view is that the creditor can prove only for what he is equitably entitled to receive. Neither of these views is entirely consistent with the authorities. Upon the latter theory dividends from one estate, although not declared until after proof against the other, should diminish that proof. And upon this view the legal rights of a creditor

who holds as security for his debt an obligation of a third person for a sum exceeding the amount of the debt are greatly curtailed. It is held, and it certainly seems just, that in the bankruptcy of such third person, proof may be made against his estate for the full amount of his obligation, though the dividends will be limited to the amount of the primary debt. This decision must go upon the theory that a creditor may prove for his full legal debt. And the rule based upon this theory, and recognizing the true nature of the defence of payment, is not only consistent and sound upon legal principles, but will also be found in application to produce the most satisfactory results.

2. Where A is solvent and B insolvent, and A pays the whole debt, what are the rights of A as to proof in bankruptcy against B's estate?

The settled rule is that A can only prove for half the debt. This may rest either on the ground that B really owes A only half of the amount paid, or on the theory suggested above that a creditor can only prove for what he is equitably entitled to receive. It is open to the same criticism as the rule in the case where A and B are both insolvent. If B, for example, can pay fifty per cent., the creditor by going first upon B's estate for the full amount will receive half the amount due, and can recover the other half from A. If he goes first upon A he will recover the whole from him, and B's estate will only be compelled to pay A one-quarter of the amount of the debt. If the view be adopted that the creditor can prove for the whole legal debt, a more satisfactory result will be reached. After A has paid, B is still liable at law to C for the full amount. As we have seen, on principle C should be allowed to prove for the full amount against B's estate, and receive dividends up to half the amount of the debt for the benefit of A. His legal right against B he really holds solely for A's benefit. And it would seem that A should be subrogated to this right, and allowed to prove directly against B's estate. There is a line of cases which seem to support this theory. Where it is the law that in bankruptcy specialty debts shall be paid first, if A and B are jointly liable on a bond to C, and A pays the whole, his claim in bankruptcy against B is treated as a specialty claim. This can only rest on the theory that A proves on the legal right against B vested in C, but held by C for A's benefit. It would seem that consistency would require that in such a case A's proof should be for full amount. But the cases hold otherwise.

## RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the court. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

AGENCY — MASTER AND SERVANT — CONCEALED RISKS OF EMPLOYMENT — *VOLENTI NON FIT INJURIA*. — Plaintiff, employed in defendant's factory, was injured by falling upon steps which, as plaintiff was aware, had been rendered icy by the freezing of spray from steam-pipes. *Held*, that it was error to withdraw the case from the jury upon the ground that the risk was one which, by entering the employment, she had assumed. *Fitzgerald v. Connecticut River Paper Co.*, 29 N. E. Rep. 464 (Mass.).

The court reasoned that an employee did not, by entering the service, take the risk of non-apparent dangers; that it was not established in this case that when plaintiff entered the employ of defendant, she had reason to foresee that the steps

would be left covered with ice; nor was it shown that at the time of the accident she either fully appreciated the danger, or ought to have done so, or had any other egress from the building by which she might have avoided it. It was admitted by the court that their reasoning would tend greatly to lessen the value of "*volenti non fit injuria*" as a defence.

AGENCY — MASTER AND SERVANT — LIABILITY OF MASTER. — *Held*, that where plaintiff was injured by the negligence of a truck-driver in the employment of defendant, but who was on that day serving another company under a contract which the defendant had made with the latter to furnish it daily with a horse, truck, and driver, defendant, and not the other company is liable for the injury. *Quinn v. Electric Co.*, 46 Fed. Rep. 506 (N. Y.).

AGENCY — RATIFICATION. — Members of the defendant's school board made a written contract not under seal which they signed as individuals, but in the body of which they called themselves "members of school board of defendant." This contract was ratified by vote of the school board as a body, and also by vote of the defendant town. *Held*, the defendant town was not liable, as the contract did not purport to bind it, and their vote of ratification was ineffectual because no contract had ever been made on their behalf. *Western Publishing House v. District Tp. of Rock*, 50 N. W. Rep. 551 (Ia.).

Quere whether this defendant was not liable as undisclosed principal to a simple contract made in the agent's name.

AGENCY — VARIANCE FROM AUTHORITY. — A letter authorizing agents to sell land for \$2,200, "provided that the party could pay \$700 down and the balance in one, two, and three years," did not authorize them to sell for \$1,000 down and the balance in one and two years. *Speer v. Craig et al.*, 27 Pac. Rep. 891 (Col.).

BILLS AND NOTES — MORAL CONSIDERATION. — A note payable to a missionary society, which recites that the maker desires "to advance the cause of missions, and to induce others to contribute to that purpose," shows that it is given upon sufficient consideration. *Garrigus v. Home Frontier and Foreign Missionary Society*, 28 N. E. Rep. 1008 (Ind.).

BILLS AND NOTES — STATUTE OF LIMITATIONS. — The statute runs from the time of the last payment on a note, *Crockett v. Mitchell*, 14 S. E. Rep. 118 (Ga.).

CHAMPERTY — EFFECT ON RIGHT OF ACTION. — While a champertous agreement between plaintiff and his attorney for the prosecution of a certain suit is against public policy and void, it does not affect plaintiff's right to prosecute the action in regard to which the champertous agreement was made. *Pennsylvania Co. v. Lombardo*, 29 N. E. Rep. 573 (Oh.).

CONSTITUTIONAL LAW — ASSOCIATIONS — FORFEITURE OF PROPERTY. — The constitution and by-laws of the Knights of Labor provide that on suspension of a local assembly, its property shall be forfeited and shall vest in the secretary of the general assembly. *Held*, that this provision is void; it confiscates, without judicial process, property which is not derived from the general assembly, but is held and owned by the local assembly absolutely. *Wicks v. Monihan et al.*, 29 N. E. Rep. 139 (N. Y.).

CONSTITUTIONAL LAW — CRIMINAL LAW — EXCLUSION OF PUBLIC. — Under the constitution providing "that the accused shall have speedy and public trial," and a statute that "the sittings of every court in the State shall be public," it is reversible error for the court on a murder trial to order the exclusion from the court-room of all but "respectable citizens." *People v. Murray*, 50 N. W. Rep. 995 (Mich.).

CONSTITUTIONAL LAW — CRUEL PUNISHMENTS. — New York code provides that a criminal under sentence of death shall be kept in solitary confinement in the penitentiary until executed, and that the court shall designate a week during which the execution must take place, but that the warden shall fix the day and hour, keeping the same secret from the prisoner and the public. *Held*, that legislature and court of New York having determined that this is not a cruel and unusual punishment, this court cannot say that it infringes on the immunities or privileges secured to citizens of the United States by the fourteenth amendment. *McElwaine v. Brush*, 12 Sup. Ct. Rep. 156.

CONSTITUTIONAL LAW — IMPAIRING OBLIGATION OF CONTRACTS — STATE COURT DECISION. — Where the State court construes the charter of a corpora-

tion so that it does not exempt it from the particular tax complained of, there is no impairment of the obligation of the contract between the State and the corporation by any subsequent law of the State, and the Supreme Court of the United States has no jurisdiction. *St. Paul M. & M. Ry. Co., v. Todd County, Minn.*, 12 Sup. Ct. Rep. 281.

Here the tax was assessed under the general taxing-laws in force at the time of granting the charter; there was, therefore, no subsequent law which could be said to impair its obligation. The assessment was a purely ministerial act, and not a law of the State, and so not within the constitutional prohibition. This differs in the above particular from cases where a subsequent law enters into the case, and where it is settled that the United States Supreme Court has jurisdiction to review the State court's construction of the contract.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TAX ON GOODS. — A statute requiring all merchants to pay a tax of "one-tenth of one per cent. on the total purchases in or out of the State" does not interfere with interstate commerce within the meaning of the Constitution. It is a tax on the goods, and not on the privilege of purchasing them. *Ex parte Brown*, 48 Fed. Rep. 435.

CONSTITUTIONAL LAW — PROTECTION OF WITNESSES — SELF-CRIMINATING TESTIMONY. — Revised Statute, 1860, provides that no "evidence obtained from any party or witness by means of a judicial proceeding . . . shall be given in evidence, or in any manner used against him, or his property or estate, in any court of the United States, . . . in any criminal proceeding, or for the enforcement of any penalty or forfeiture." *Held*, that, as this provision would not prevent the use of testimony so obtained to search out other testimony to be used against the witness, the protection afforded is not coextensive with that of the fifth amendment, which declares that no person "shall be compelled in any criminal case to be a witness against himself;" and hence a witness in any criminal investigation in the federal courts may still refuse to answer, on the ground that this testimony will tend to criminate himself. 44 Fed. Rep. 268 reversed. *Counselman v. Hitchcock*, 12 Sup. Ct. Rep. 195.

See articles on this case in 5 Harv. Law Rev. 24.

CONTRACTS — ILLEGALITY — INTERSTATE COMMERCE RATES. — The interstate commerce law makes it penal for a carrier to issue bills of lading at rates different from those filed with the commission, or to demand or receive freight charges variant from such established rates. The act makes it penal for any person to knowingly obtain transportation at less than the established rates. Defendant agreed to carry goods from Illinois to Alabama over its own and a connecting line. The bill of lading called for \$5 freight charges, but the connecting line refused to deliver up the goods to the plaintiff, the consignee, except on payment of \$29, the schedule rate. Neither plaintiff nor consignor knew the schedule rate. *Held*, the plaintiff may recover the value of the goods. He was not bound to know the published schedule of rates. *Mobile & O. R. v. Dismukes*, 10 So. Rep. 289 (Ala.).

CORPORATIONS — EXEMPTION FROM TAXATION — LIABILITY TO MUNICIPAL ASSESSMENTS. — A charitable corporation exempt by law from all taxation is liable under a municipal assessment for repairing the street in front of its property as such obligation is not imposed under the taxing power, but is in the nature of a police regulation. *City of Philadelphia v. Contributors to the Pennsylvania Hospital*, 22 Atl. Rep. 744 (Pa.).

CORPORATIONS — LIMITATION OF INDEBTEDNESS. — Constitution of Iowa provides that municipal corporations shall not incur indebtedness beyond a limited amount. Statute provides that they may issue new bonds in exchange for old bonds, or sell them and apply the proceeds to paying off the old ones. A certain township, whose indebtedness already exceeded the constitutional limit, issued bonds under said statute. *Held*, that the bonds are unenforceable, as issued in excess of the amount allowed by the constitution. *Brown, Harlan, and Brewer, JJ., dissenting. Dist. Township of Doon, Lynn Co., Ia., v. Cummins*, 12 Sup. Ct. Rep. 220.

The point of difference between the majority and the minority was this: These new bonds, being only in exchange for the old bonds, in no way increased the town's indebtedness, and so, the minority said, did not violate the constitution; while the majority construed the constitution more strictly, and pointed out that



if these bonds were held good, the indebtedness would be increased, if the town officers should not do their duty in applying the proceeds to the payment of the old bonds.

**DAMAGES — RAILROADS — ABUTTING OWNERS.** — Where a railroad has been built along a street, abutting owners may recover prospective damages, the measure of damage being the difference in value before and after the injury. *Highland Ave. & B. R. v. Matthews*, 10 So. Rep. 267 (Ala.).

This rule had been previously applied to municipal, and is now extended to private corporations.

**EQUITY — SPECIFIC PERFORMANCE — STATUTE OF FRAUDS — PART PERFORMANCE.** — An oral agreement to convey land is not taken out of the statute of frauds by the payment of the purchase money. *Forrester v. Flores*, 28 Pac. Rep. 107 (Cal.).

The true rule is conceived to be as follows: Payment of the purchase money will not take the contract out of the statute of frauds on the ground of fraud, since the vendor can recover the money at law, and the law presumes that he is made whole by the recovery with costs; but payment of the purchase money, as part performance, will take the contract out of the statute of frauds, since the acceptance of the money by the vendee must be taken as an admission of the agreement alleged, and, therefore, a partial carrying out of its terms.

**EQUITY — INJUNCTION — RIGHTS OF TAX-PAYER.** — A resident and tax-payer of a school district who lives near the legally located school-house, and who has children of proper age to send to school, and whose taxes will be materially increased by a removal of the school-house two and a half miles further from his residence, has such an individual interest in the subject-matter, not common with all other tax-payers of said district, that he may go to equity to enjoin unlawful removal of said school-house. *Graves v. Jasper School Township*, 50 N. W. Rep. 904 (S. Dak.).

**EVIDENCE — COMPETENCY OF WITNESSES — PARDONED CRIMINAL.** — The granting of a full and unconditional pardon by the President of the United States to a person convicted of a felony restores his competency as a witness, and this result is not affected by a recital in the pardon that it was granted for the reason, among others, that his testimony was desired by the government in a cause then pending in a court of the United States. *Boyd v. United States*, 12 Sup. Ct. Rep. 292.

**EXTRADITION — TRIAL FOR DIFFERENT OFFENCE.** — A person surrendered on extradition proceedings by the authorities of another State cannot, while held in custody thereunder, be tried for a different crime from the one upon which his extradition was obtained, unless he voluntarily waives his privilege. *Ex parte McKnight*, 28 N. E. Rep. 1034 (Ohio).

**HUSBAND AND WIFE — DIVORCE — VOLUNTARY SEPARATION — ADULTERY.** — A husband may obtain a divorce for his wife's adultery, notwithstanding that, in pursuance of an agreement under which they were married, they have never lived together as husband and wife. *Franklin v. Franklin*, 28 N. E. Rep. 680 (Mass.).

**INSURANCE — CONDITIONS OF POLICY.** — The policy sued on forbade the use of open lights on the premises insured, but permitted necessary repairs. Certain repairs could be made only by using open lights. At the time of applying for the policy, this fact was stated to the defendants' agent, who replied that by the policy permission was given to repair at all times. *Held*, the proviso in the policy must be construed as referring to the ordinary use of lights on the premises, and not to the special use in making repairs. Therefore, defendant was liable. *Ans. Sable Lumber Co. v. Detroit Manufacturers' Mut. Fire Ins. Co.*, 50 N. W. Rep. 870. (Mich.).

**INSURANCE — IN FAVOR OF WIFE — DEATH OF INSURED THROUGH CRIME OF WIFE — RESULTING TRUST IN FAVOR OF INSURED'S ESTATE.** — *Held*, the executors of a person who has effected an insurance on his life for benefit of his wife can maintain an action on the policy, notwithstanding the fact that the death of the insured was caused by the felonious act of the wife. The trust created by the policy in favor of the wife under the Married Women's Property Act, 1882, having become incapable of being performed by reason of her crime, the insurance money forms part of the estate of the insured, and as between his legal representatives and

the insurers no question of public policy arises to afford a defence to the action. *Cleaver v. Mutual Reserve Fund Life Association* [1892], 1 Q. B. 147. [Ct. of App. (Eng.)]

The court treated the executors as trustees under the statute for the wife, and then for the estate. The trust in favor of the wife having been rendered incapable of performance by her crime, the executors recover on the policy for the benefit of the estate.

**MANDAMUS — RAILROAD — REFUSAL TO STOP AT TOWN.** — A petition for a mandamus to compel a railroad company to erect a station and stop its trains at a certain town. The town is a county seat and directly in the line of the railroad, but the company, for some purpose of its own, refused to stop there, and erected its station some distance beyond the town, where it owned land. *Held*, that the writ could not issue, there being no specific legal duty to stop at that town. *Brewer, Field, and Harlan, JJ., dissenting. No. Pac. R. Co. v. Territory of Washington*, 12 Sup. Ct. Rep. 283.

**MORTGAGES — SATISFACTION — INTENTION TO KEEP ALIVE.** — S conveyed her equity of redemption in mortgaged premises to P. She afterwards brought action to have the conveyance set aside, and obtained a decree to that effect. During the pendency of the suit P had paid off the mortgage, and he now claimed that it still subsisted as against S, as an incumbrance in his favor upon the estate. *Held*, that whether payment of a charge extinguishes the charge depends upon the intention with which payment is made. Here the payment was made during the pendency of the suit, and there is hence a presumption that P intended that the mortgage should survive. *In re Pride* [1891] 2 Ch. 135.

**MUNICIPAL CORPORATIONS — PARLIAMENTARY LAW — MAJORITY VOTE.** — Under a statute which provides that an issue of school bonds must be authorized by vote of "a majority of all the inhabitants of any school district entitled to vote, to be ascertained by taking . . . the ayes and noes of such inhabitants attending at any school-district meeting": *held*, Parker, J., dissenting, that a vote in favor of bonds by the majority of those voting is sufficient to satisfy the statute, though such majority is less than half of the voters actually present at the meeting. *Smith et al. v. Proctor et al., School Trustees*, 29 N. E. Rep. 312 (N. Y.).

In so far as this decision has any bearing on the much-vexed "quorum" question, it is obviously calculated to give aid and comfort to Speaker Reed.

**NEGLIGENCE — IMPUTED NEGLIGENCE — DOCTRINE OF THOROGOOD v. BRYAN.** — Where one hires a hack, the driver of which is employed by the owner and is not controlled by the passenger, the negligence of the hackman is not imputable to the passenger, since the former is not the latter's servant. *Randolph v. O'Riorden et al.*, 29 N. E. Rep. 583 (Mass.).

This decision adds Massachusetts to the long list of jurisdictions which reject *Thorogood v. Bryan*, 8 C. B. 115.

**PARTNERSHIP — RIGHTS OF RETIRING PARTNERS.** — Upon the dissolution of a partnership, the retiring partners, having sold "all their right, title, and interest in the firm" to the remaining partners, can, in the absence of a stipulation to the contrary, engage in the same business, and personally solicit the old customers. And this is true even though the good-will was included in the sale to the remaining partners. *Williams v. Farrand*, 50 N. W. Rep. 446 (Mich.).

This would seem to be opposed to the English decisions. See Addison on Contracts, 1154. *Labouchere v. Dawson*, L. R. 13 Eq. 322.

**PERSONAL PROPERTY — RIGHTS OF DESIGNERS IN THEIR OWN COMPOSITIONS.** — A draughtsman or designer has such property in a model or plan of his own composition as to be entitled to maintain an action for the unauthorized use of such, although no letters patent or copyright has been secured. *New England Monument Company v. Johnson*, 22 Atl. Rep. 974 (Pa.).

**PRACTICE — UNOFFICIAL OPINION — DOES NOT PRECLUDE JUDGE FROM SITTING.** — The judge had presided at the trial in which the prisoner was alleged to have committed perjury. He became firmly convinced of the guilt of the prisoner and had stated this opinion unofficially. *Held*, this does not disqualify him from presiding at the trial of the indictment for perjury. *Heflin v. State*, 14 S. E. Rep. 112 (Ga.).

**PROPERTY — TRADE-MARKS — INVENTIONS.** — A trade-mark is a personal sign or badge distinguishing the productions of one individual from those of another. A mere mechanical contrivance, a method of construction or of ar-

rangement, is not a trade-mark, but an invention, which must be patented if it is to be monopolized. Therefore, the fact that the manufacturer of a certain article has adopted a bottle of peculiar form does not prevent a rival manufacturer of the same article from adopting the same kind of bottle, which is in the public market; and the mere mechanical arrangement of bottles in packing is neither an invention nor a trade-mark whose use by others may be resisted. *Hoyt v. Hoyt*, 22 Atl. Rep. 755 (Pa.).

This case places a decided limitation upon the principle on which the courts of various jurisdictions, in cases analogous to trade-marks, have restrained a particular defendant, by reason of his fraud, from using a mark or sign to which the plaintiff, as far as concerns the general public, has no exclusive right. See 4 Harv. Law Rev. 321, and cases there cited; also, 5 Harv. Law Rev. 139.

**REAL PROPERTY — DEDICATION — WHAT CONSTITUTES ACCEPTANCE.** — A street ran through the business portion of a town. The sewer and water commissioner by authorization of the mayor and council made an excavation into which plaintiff fell and was injured. There was no evidence as to the origin of the street nor as to the length of user nor as to the power of the town authorities to bind the town; yet it was held that a sufficient dedication and acceptance would be presumed, and that the plaintiff should recover. *Town of Salida v. McKinna*, 27 Pac. Rep. 810 (Col.).

**REAL PROPERTY — EASEMENTS — PRESCRIPTION — TACKING OF DIFFERENT USERS.** — Defendant's elevated road was operated by cable from 1868 to 1871, and by steam from 1871 to 1888. In 1879 the supports of the track, during the process of reconstruction, were moved 16 inches nearer plaintiff's building. Defendant claimed that a certain portion of plaintiff's right had been lost by continuous adverse user on defendant's part for twenty years. *Held*, that adverse user cannot be divided, and as on the whole the users for a cable road and for a steam road are different, no account will be made of that fractional part of each which is common to both and continuous; the two users will be treated as entirely disconnected, and cannot be tacked. *Am. Bank Note Co. v. New York El. R.R. Co.*, 29 N. E. Rep. 304 (N. Y.).

**REAL PROPERTY — MORTGAGES — FRAUD ON CREDITORS — WIDOW'S RIGHT OF DOWER FREE OF EQUITIES.** — A, by deed absolute on its face conveyed land to defendant, one of his creditors, partly with a view to secure defendant's debt, partly to defraud the other creditors. After A's death, his widow and his heirs brought a bill to have the deed declared a mortgage. *Held*, that the heirs, as they claimed through A, were debarred from relief, though themselves innocent, by reason of A's fraud, and that the same rule applied to the widow in respect to land claimed by inheritance from deceased children; but that in respect to the portion which would have come to her by right of dower, she would not be debarred of relief, although she joined in the conveyance to B, unless at the time she had knowledge of the fraud. *Kitts et al. v. Wilson et al.*, 29 N. E. Rep. 401 (Ind.).

**REAL PROPERTY — REMOTENESS — POSSIBILITY OF REVERTER.** — A conveyed land to a religious society for so long as the society shall support certain specified doctrines, and when the land is devoted to other purposes, "then the title of said society, or its assigns, shall forever cease, and be forever vested in the following-named persons," among them A himself. *Held*, that this limitation is void for remoteness. That the society takes a qualified or determinable fee, with a possibility of reverter in A. That the possibility of reverter dependent on a condition subsequent is not within the rule against perpetuities, [*Tobey v. Moore*, 130 Mass. 448; *French v. Old South Soc.*, 106 Mass. 479], and *a fortiori*, this possibility of reverter dependent on a qualified or determinable fee is not within the rule. *First Ch. Soc. of No. Adams v. Boland*, 29 N. E. Rep. 524 (Mass.).

**REAL PROPERTY — REMOTENESS — SPLITTING CONTINGENCY.** — A testator gave his residuary estate in trust, as to one-fifth share for his son A for life; remainder in fee to such children of A as shall attain twenty-one, and also to such children of any son or daughter of A who might die under twenty-one, as should live to attain twenty-one. The four other one-fifth shares were to be held on similar trusts for the testator's daughters, B, C, D, and E, respectively, and their respective issue. And the testator declared that if any or either of A, B, C, D, and E should die without leaving any lawful issue who should live to attain a vested interest in their respective shares, the share or shares to which such failure

should happen should go over to the other members of the class upon the same trusts as the other shares were held upon. A dies without ever having had a child. *Held*, that the gift over was too remote, and could not take effect. It cannot be split into gifts upon two contingencies, one of which is the death of A without leaving issue. The case of *Evers v. Challis* (7 H. L. C. 531) is confined to the case where an executory devise over can be split into two gifts, one of which is a remainder. *In re Bence* [1891] 3 Ch. Div. 242.

REAL PROPERTY — QUASI EASEMENT TO FREEDOM FROM NOISE — PROCEEDINGS IN EQUITY. — Where plaintiff, an abutting owner, brings a bill in equity against defendant, an elevated railroad company, as a result of which proceedings defendant is ordered to pay a lump sum in condemnation of plaintiff's easements, *held*, by four judges, three dissenting, that the element of damage by noise cannot be admitted. *Kane v. R.R. Co.* 125 N. Y. 164, distinguished. The Court say that where plaintiff sues for a past wrongful interference with his rights, he can recover for all incidental damage, of which noise is a part; but, as no such thing exists as a quasi easement or absolute right to freedom from noise, and as the "fee damages" awarded by equity are by way of condemnation and purchase, and not by way of damages for a tort, plaintiff cannot receive payment for something which he does not possess and cannot sell. *American Bank Note Co. v. N.Y. El. R.R. Co.*, 29 N. E. Rep. 305 (N. Y.).

REAL PROPERTY — WASTE — CUSTOM. — The cutting of timber by a life-tenant in accordance with the modern method of cultivating timber estates is not waste. Evidence of modern usage in that respect is admissible in determining what is waste; and it is not necessary that the usage or custom should be immemorial. *Dashwood v. Maginac*, [1891] 3 Ch. Div. 306.

STATUTE — WIDOW'S ALLOWANCE — CONSTRUCTION OF "NECESSARIES." — Under a statute which exempts from liability for the debts of the deceased such parts of his personal estate as the Probate Court, "having regard to all the circumstances of the case, may allow to the widow, for herself and for his family under her care," A received \$5,000. It appeared that A had \$1,200 a year in her own right; that she expected to live, free of charge, with her father; and that she had no children. Her husband's estate was insolvent. *Held*, upon appeal by the creditors, that the allowance should be reduced to \$500, as the statute contemplated nothing more than the satisfaction of actual temporary wants. Morton and Allen, JJ., dissented, on the ground that the social position and habitual style of living of the petitioner ought to be taken into account, and also because it was contrary to the received practice to interfere with the discretion of the Probate Court. *Dale v. Hanover Nat. Bank*, 29 N. E. Rep. 271 (Mass.).

SURETYSHIP — DISCHARGE OF SURETY — CONCEALMENT BY PRINCIPAL WHEN NOT TO SURETY'S PREJUDICE. — B bought a traction engine of plaintiff, and gave in payment for it three notes, maturing at intervals of a year. On the second of these notes he secured the indorsement of defendant as surety. He also gave plaintiff, unknown to defendant, a mortgage, providing, among other things, that on default of any one of the notes all should become due. *Held*, that the mortgage did not operate as a change of the contract, to discharge the surety; nor was failure to notify her thereof the suppression of a material fact amounting to fraud. *Springfield Engine & Thresher Co. v. Park*, 29 N. E. Rep. 444 (Ind.).

SURETYSHIP — GUARANTY OF NOTE — EXHAUSTING SECURITIES. — A assigns a note secured by mortgage, and as part of the same transaction assigns the mortgage and guarantees the payment of the note. *Held*, A is not liable on the guaranty until resort has been had to the mortgage security. A's contract is to pay the debt if, by due diligence, it cannot be collected from the debtor or out of the mortgage security. *Dewey v. W. B. Clark Inv. Co.*, 50 N. W. Rep. 1032 (Minn.).

TORT — ACTION OF WIFE FOR ENTICEMENT OF HUSBAND. — Under an Indiana statute which gives to married women the right to sue alone for injuries to their persons and property, *held*, that a wife can maintain an action in her own name against one who wrongfully entices her husband from her, and thereby deprives her of his *consortium* and support. *Haynes v. Nowlin*, 29 N. E. Rep. 389 (Ind.).

This doctrine is of very recent growth; the earliest case in accord decided in a court of last resort in this country being *Westlake v. Westlake*, 34 O. St. 691 (1878). According to the most recent survey of the authorities (26 Am. Law Rev. No. 1), Ohio, Connecticut, New York, New Hampshire, and the U. S. Circuit Court in Illinois allow the action; England (*Lynch v. Knight*, 9 H. L.

Cas. 577), Wisconsin, Maine and the U. S. Circuit Court in Kansas, do not. Indiana refused the action in 1881 under a slightly different statute, but in 1891 allowed it to a woman after her divorce.

**TRUSTS — CORPORATIONS — RECEIVER.** — An insurance company deposited some of its funds with a trust company, to be distributed among the certificate holders in case the insurance company made default in meeting its obligations. Afterward the trustees of the insurance company petitioned for its voluntary dissolution, and a receiver was appointed. *Held*, that the Court had no power to compel the trust company, in the absence of misconduct on its part, to turn the trust fund over to the receiver to be distributed by him instead of by the trust company. *In re Voluntary Dissolution of Home Provident Safety Fund Ass'n of New York*, 29 N. E. Rep. 323 (N. Y.).

**TRUSTS — FRAUDULENT CONVEYANCES.** — A father gave to his minor son as a gift a note for \$1,000. The father collected the note when due and invested the money in shares of an iron company, the stock being in the son's name. This stock depreciated, and the father, in consideration of this fact and also of a debt of a few hundred dollars due to his son, conveyed to him land worth \$1,000. At the time of this conveyance, the father was insolvent. *Held*, the conveyance was not in fraud of creditors. *Second National Bank v. Merrill, etc. Works*, 50 N. W. Rep. 503 (Wis.).

The Court here regarded the father as trustee for the son, and thought that he ought to restore to the son the depreciation in value of the corpus of the trust fund. It might be questioned whether a trustee who invests *bona fide* is liable if the funds fall in value. If he is not so liable, it would seem that the son gave no value for the conveyance, which therefore should have been set aside.

**TRUSTS — LACK OF BENEFICIARIES — TILDEN WILL.** — Where property is left to executors for an association to be incorporated, with full discretion in the executors as to the amount to be so applied, the rest to be applied to such charitable, scientific, or educational institutions as they think fit, there is no valid trust, for lack of a certain beneficiary, the *cy-près* doctrines having no force in New York. *Tilden v. Green*, 28 N. E. Rep. 880 (N. Y.).

**WILLS — RESIDUARY DEVISE — ACCELERATION.** — Where a will provides that certain moneys shall go to the testator's wife, and that the remainder of the estate shall be held in trust by the executor, the income to be paid to the wife during her life, at her decease certain legacies to be paid, and the residue to go to the next of kin; the fact that the wife elects to take her statutory portion of the estate, instead of taking under the will, does not accelerate the time of payment of the legacies, and they cannot be paid until after the decease of the widow. *Jones v. Knappen*, 22 Atl. Rep. 630 (Vt.).

## REVIEWS.

**DIGEST XIX. 2 LOCATI CONDUCTI.** Translated with notes, by C. H. Monro, Fellow and Lecturer of Gonville and Caius College, Cambridge. Cambridge: University Press, 1891. 8vo. pp. 83.

This little book in its style and character forms a companion volume with the series of Selected Titles from the Digest, by Bryan Walker, and can hardly fail to interest a student or lawyer who has read the Institutes. To pass from the Institutes to the Digest is to make a distinct advance in the study of Roman law; for the Digest is to the Institutes as our law reports are to the easy and flowing Blackstone. In the Digest we are brought closer to the Roman law as a practical system, full of knotty problems, and by no means free from conflicting or dissenting judgments, as the present volume attests. In the Digest also we make the acquaintance of the great Roman lawyers, and the work derives an added interest from the many opportunities it affords to compare the decisions of their acute and powerful minds with the decisions upon similar questions of judges of the common law, equally

acute and powerful. Mr. Monro has in several notes cited English decisions upon parallel questions. More of such citations might be easily made, and would add to the value of the work. They would have a tendency to increase interest in the Roman law, which is a part of the value of books like this. The work of translation is well done, but the author's remarks in the preface upon the subject of translation are sensible and just. "I am," he says, "to say the truth, not without a misgiving that the student derives little or no benefit from any translation at all, as he is encouraged to neglect the original, and thus bestow his time on the acquisition of a curious kind of artificial learning which cannot be called Roman law, or by any other particular name, and is only of conventional value." Mr. Monro's notes are useful without being elaborate, and discover an accurate general knowledge of the Digest and of the literature of the subject. W. S.

VILLAINAGE IN ENGLAND. By Paul Vinogradoff. 1892. Oxford. At the Clarendon Press.

The author of this work is Professor in the University of Moscow, and a reason for its appearance from so unexpected a quarter is to be found in the necessity felt among the thinking class in Russia for some means of meeting the problems and difficulties occasioned by the sudden emancipation of so large a body of their countrymen, and for some rules or principles which may guide their future social development. These national necessities tinge the author's views of the functions of history. In brief they are as follows: History in the past has been political; in the future it must be economic and social. In the past it has concerned itself chiefly with the analysis of the development of, and working of, principles of government; in the future it must rather consider the social and economic development of the people and the conflict of classes. In the England of seven centuries ago the condition of the rural population was not unlike that of the same class in the Russia of a generation ago. In England by the policy of the law and by her freer political institutions, the process of social development began earlier and was complete sooner than elsewhere; to England, therefore, the author looks for the desired instruction. That a foreigner, from his freedom from national prejudice, may enjoy certain advantages in the study of the general features of any political system is, perhaps, undeniable. Three of the most thorough and impartial works upon our political institutions have proceeded from foreigners; but that the same advantage holds true of the treatment of special topics, is more open to question. In the present case it appears to have been attempted with satisfactory results. The work shows careful and thorough study of the older legal authorities; the results which are reached are carefully stated, nor does the author hesitate to express his dissent when they are in conflict with those of previous workers in the same field.

The book is in form two essays; in the first is considered the Peasantry of Feudal Age; in the second the Manor and Village Community is treated of. The work is of interest to the specialist rather than the general reader, and though discussing a point of legal learning, to the student of political science rather than to the student of the law. The publication is by the Clarendon Press, the uniform excellence of whose work makes comment unnecessary. R. O. A.

ABRIDGMENT OF ELEMENTARY LAW. By M. E. Dunlap, counsellor-at-law. Enlarged edition. St. Louis: The F. H. Thomas Law Book Co. 1892. pp. 478.

This little volume contains brief abridgments of Blackstone's Commentaries; of Pleadings, including Parties to Action and Forms of Action; of the Law of Evidence, as stated in Greenleaf, to which are added many notes and illustrations from other text-books; of the Law of Contracts, as stated in the work of Parsons, and of Equity Jurisprudence, as stated in the work of Story. The last fifty pages of the book contain Suggestions to Students, a Glossary of Law Terms and Maxims, a Table of British Regnal Years, and a list of the Chief-Justices of the United States. Under the head of Suggestions to Students, the author has given careful selections from some of the leading English and American writers in the arena of legal science, with a view to giving the student some practical hints touching the best methods of acquiring a knowledge of the law and its practice.

"The chief design of this work is to give in the fewest pages the principles and definitions of law and equity, to furnish a review or note-book and *vade mecum* for law students and young practitioners." The work of the author is thoroughly done, and the book is a handy and valuable one for the purpose for which it is intended.

REPORT OF THE FOURTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. Dando Printing and Publishing Co. Phila., 1891. pp. 478.

The Report of the Fourteenth Annual Meeting of the American Bar Association, held at Boston in August, 1891, contains, besides the usual minutes of the meeting, the address of the President, Mr. Simeon E. Baldwin, of Connecticut, on the most noteworthy changes during the past year in American statute law; the Annual Address, by Hon. Alfred Russell, of Michigan, on "Avoidable Causes of Delay and Uncertainty in our Courts;" a paper by Mr. Frederick N. Judson, of Missouri, on "Liberty of Contract under the Police Power;" a paper on "The Legal Status of the Indians," by Mr. William B. Hornblower of New York; and the Reports of the Committees on Jurisprudence and Law Reform, on Judicial Administration and Remedial Procedure; on Legal Education (an exhaustive discussion of present methods and results of legal education throughout the country); on the Award of Medal; on Uniform State Laws; on the Relief of the Supreme Court, and on Classification of the Law (appended to which is a table showing the proposed classification). A number of obituary notices follow, and the volume is closed with a list of the Bar Associations of the United States.

## LEADING ARTICLES IN EXCHANGES.

**The Green Bag.** Vol. IV.

No. 2. A Letter to Posterity [with Portrait], by Chief-Justice Bleckley;—The Accused; Supreme Court of Georgia; Tyrrel's Case and Modern Trusts, by Professor Ames.

**Michigan Law Journal.** Vol. I.

No. 1. Appointment of Presidential Electors by Judge Cooley; Presidential Voting Methods; Writing Ink and its Identification on Written Documents.

**Columbia Law Times.** Vol. V.

No. 4. Attorney and Client; Farm Mortgages and Silver Legislation; Priority of Receivers, Certificates over Mortgage Liens.

**American Law Register.** Vol. 31.

No. 1. Equity Jurisdiction applied to Crimes and Misdemeanors; Mortgages under Powers to Sell Land and Pay Debts.

**Central Law Journal.** Vol. 34.

No. 5. Limiting the Right to Contract. Counselman's Case.

No. 6. Representations Concerning the Credit and Ability of Others under the Statute of Frauds.

No. 7. Mortgage of Crops.

No. 8. Intent to Pass Title on Sales.

No. 9. Bona Fide Purchaser by Quit-Claim.

**Albany Law Journal.** Vol. 45.

No. 7. Legal Journalism.

**Washington Law Reporter.** Vol. XX.

No. 8. Waste by Tenant in Common Mining; Duty of Telephone Companies to Furnish Service.

**The Law Journal.** London. Vol. XXVII.

No. 1359. Brands.

**Yale Law Journal.** Vol. I.

No. 3. Some Anomalies of Practice; Recent Decisions under the Evarts Acts; The Status of a Defendant in Equity to a bill for Infringement of Letters Patent; The Dignity of Litigation.

**The Counsellor, of the New York School.** Vol. I.

No. 5. Perpetuities; Conflict of Laws; How to find the Law; The Study of Law in Germany; Tenancy by the Entirety.











